Applicant Details

First Name	**Dana**
Last Name	**Abelson**
Citizenship Status	**U. S. Citizen**
Email Address	**dabelson@jd24.law.harvard.edu**
Address	**Address** Street **65 Langdon Street #10** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**3128106192**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**May 2020**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights-Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Suk-Gersen, Jeannie
jsg@law.harvard.edu
617-496-8834
Doerfler, Ryan
rdoerfler@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dana Abelson

65 Langdon Street #10, Cambridge, MA, 02138
(312) 810-6192 | dabelson@jd24.law.harvard.edu | she/her

June 14, 2023

The Honorable Juan Ramon Sánchez
601 Market Street, Room 11614
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am a rising third-year student at Harvard Law School writing to apply for a clerkship in your chambers beginning in either 2024 or 2025. I am particularly interested in clerking for you given your background in public service.

I have attached my resume, law school transcript, and writing sample. You will be receiving letters of recommendation separately from the following people:

Professor Jeannie Suk Gersen
Harvard Law School
jsg@law.harvard.edu
(617) 496-5487

Professor Ryan Doerfler
Harvard Law School
rdoerfler@law.harvard.edu
(617) 496-4919

In addition to the experience and connections I have gained as President of Lambda, Harvard Law School's 270-member LGBTQ+ student organization, I have also spent much of my time in law school seeking out opportunities to sharpen my skills in legal research, analysis, and writing. As a research assistant for Professor Ryan Doerfler, I have completed several significant projects for his upcoming book on administrative law and legal theory. And as Executive Managing Editor of the *Harvard Civil Rights–Civil Liberties Law Review*, I have been responsible for leading a team of over a dozen editors in preparing articles, both substantively and technically, for publication.

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Dana Abelson

Dana Abelson

65 Langdon Street #10, Cambridge, MA 02138
(312) 810-6192 | dabelson@jd24.law.harvard.edu | she/her

EDUCATION

Harvard Law School — Cambridge, MA
J.D. Candidate — Spring 2024
Honors: Dean's Scholar Prize, Evidence
Activities: Lambda, President (2023–2024), Admissions & Recruitment Chair (2022–2023)
Harvard Civil Rights-Civil Liberties Law Review, Executive Managing Editor of Outside Articles
Professor Ryan Doerfler, Research Assistant
Equal Democracy Project, Director of Events

Washington University in St. Louis — St. Louis, MO
Bachelor of Arts cum laude *in Political Science and Psychology* — Spring 2020
Activities: Mock Trial, Vice President

EXPERIENCE

Department of Justice, Civil Rights Division — Remote
Incoming Intern, Housing & Civil Enforcement Section — Fall 2023

Cohen Milstein — Washington, DC
Summer Associate — Summer 2023
Researching and preparing memos for plaintiff-side antitrust, class action, and human rights litigation.

GLAD (GLBTQ Legal Advocates & Defenders) — Boston, MA
Legal Intern — Fall 2022
Drafted litigation documents, including demand letters and strategy memoranda, for cases relating to LGBTQ+ employment discrimination and the rights of trans incarcerated people in New England.

Amazon Labor Union — Remote
Legal Support Team — Summer–Fall 2022
Researched, developed, and filed unfair labor practice charges with the National Labor Relations Board on behalf of union activists.

Public Counsel — Remote
Law Clerk, Consumer Rights and Economic Justice Project — Summer 2022
Drafted briefs, motions, and other reports for both direct services cases and impact litigation focused on issues of for-profit schools, bail bonds, predatory lending, and debt relief. Prepared and gave a presentation on COVID-19 rent debt and tenants' fair credit reporting rights.

Common Cause — Chicago, IL; Washington, DC
Digital Campaigner — Spring 2020–Summer 2021
Conducted sustained digital campaigns on voting and elections policy, redistricting, and other democracy issues in Florida, Georgia, Ohio, and Pennsylvania.

INTERESTS

LGBTQ+ history, the pop music industry, musical theatre, and reading memoirs

Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Dana A Abelson
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 2 Greiner, D. James	P	4
1001	Contracts 2 Kennedy, Randall	H	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	P	2
1003	Legislation and Regulation 2 Freeman, Jody	H	4
1004	Property 2 Mann, Bruce	H	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1056	Pathways to Leadership Workshop for the Public Sector Crawford, Susan	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 2 Jackson, Vicki	H	4
1002	Criminal Law 2 Lanni, Adriaan	H	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	P	2
2391	Progressive Alternatives: Institutional Reconstruction Now Unger, Roberto Mangabeira	H	2
1005	Torts 2 Davis, Seth	P	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 36

Fall 2022 Term: September 01 - December 31

2905	Advanced Topics in Anti-Discrimination Law Schwartztol, Larry	H	2
2279	Critical Race Theory Mack, Kenneth	H	2
8012	Employment Law Clinic Churchill, Steve	H	3
2070	Employment Law Workshop: Advocacy Skills Churchill, Steve	H	2
2079	Evidence Lvovsky, Anna * Dean's Scholar Prize	H*	4

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

2050	Criminal Procedure: Investigations Whiting, Alex	P	3

Winter 2023 Total Credits: 3

Spring 2023 Term: February 01 - May 31

2000	Administrative Law Vermeule, Adrian	H	4
2366	Complex Litigation: Legal Doctrines, Real World Practice Clary, Richard	P	2
2176	Financial and Legal Needs of Low and Moderate Income Households Charn, Jeanne	H	2
7000W	Independent Writing Gersen, Jeannie Suk	H	2
3213	The Law of Presidential Elections Schwartztol, Larry	P	2
3500	Writing Group: Topics in Criminal Law, Due Process, Equal Protection, Family Law, Sexual Harassment, Sexuality, Title IX Gersen, Jeannie Suk	CR	1

Spring 2023 Total Credits: 13
Total 2022-2023 Credits: 29

Fall 2023 Term: August 30 - December 15

2035	Constitutional Law: First Amendment Weinrib, Laura	~	4
2712	Disability, Human Rights, and Development Stein, Michael Ashley	~	2
2370	Legal History: English Legal History Donahue, Charles	~	3

Fall 2023 Total Credits: 9

Spring 2024 Term: January 22 - May 10

2086	Federal Courts and the Federal System Fallon, Richard	~	5

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Dana A Abelson

Date of Issue: June 2, 2023
Not valid unless signed and sealed

2169	Legal Profession: Public Interest Lawyering Wacks, Jamie	~	3
		Spring 2024 Total Credits:	8
		Total 2023-2024 Credits:	17
		Total JD Program Credits:	82

End of official record

HARVARD LAW SCHOOL
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LEX ET JUSTITIA
OFFICE OF THE REGISTRAR

Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 14, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Dana Abelson, a rising 3L student at Harvard Law School, for a clerkship in your chambers. Dana was a student in my writing group and wrote a paper under my supervision during the Spring 2023 semester. She is an excellent writer and thinker. I have no hesitation in recommending her for a clerkship.

Dana wrote a substantial paper under my supervision, "Queer Enough? Reconsidering the Status/Conduct Distinction Amid the 'Post-Gay' Movement," about the drawbacks of relying on the status-conduct distinction in constitutional doctrine regarding LGBQ+ people. She argued that, because of diversity of expression within the LGBQ+ community, the community cannot be fully and accurately categorized within the status-conduct framework, and that the framework may be weaponized to harm the LGBQ+ community and to limit rights going forward.
During the process of formulating her topic and argument and then executing and completing the paper, Dana demonstrated many qualities that I know would be valuable in a law clerk. She is a creative thinker who is also highly organized and goal-oriented in all that she does. She has great research and writing skills. Her broad intellectual curiosity and pursuit of arguments that do not conform to conventional wisdom are particularly impressive. It took courage to take on the topic Dana chose and to criticize a framework that a legal community has accepted for decades. She demonstrated that she can think well beyond accepted frameworks to explore new intellectual directions that may better protect the values and rights that are at stake and that are important to her.

Dana worked on her paper with me while participating in a semester-long writing group of students who were also pursuing their own writing projects. In that group, Dana was a delightful presence. She was always prepared with deep and trenchant comments on other's writing. She worked hard to be helpful, offering generous insights and feedback that were focused and rigorous. She was open about her own intellectual quandaries while writing and supportive of her classmates.

Dana is a strong communicator, both verbally and in writing. She is adept at organizing and juggling a number of projects at once. She is a thorough and efficient finisher. She does not delay or bumble around. Her intellectual curiosity drives her to want to know everything about a topic she is working on, and to take on complex and complicated issues. Dana is focused on pursuing a career in public service, and accordingly, has done a lot of work for the public interest while in law school. She will also be the President of Lambda in the coming year and will work remotely for the Department of Justice Civil Rights Division in the fall.

I am very happy to recommend Dana for a clerkship, and I hope you will let me know if I can be of further assistance as you consider her application.

Sincerely,

Jeannie Suk Gersen
John H. Watson, Jr. Professor of Law
Harvard Law School

Jeannie Suk-Gersen - jsg@law.harvard.edu - 617-496-8834

June 14, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Dana Abelson for a clerkship in your chambers. Dana has been my research assistant since Fall 2022, helping me with numerous projects relating to my work on judicial reform. Dana has been an outstanding research assistant from her very first assignment. She works quickly. Her work product is thorough and concise. And she is tremendously responsive to follow-on projects, requests for further details, and so on. Based on my experience working with Dana, I have total confidence that she would be an exceptional law clerk.

Dana's research for me has been incredibly varied, displaying a range of skills. In some cases, I have asked Dana to canvas popular sources to identify illustrative quotations. In another, I asked her to survey doctrinal and historical scholarship in administrative law, preparing a series of memos outlining and summarizing scholarship having to do with administrative adjudication in a variety of contexts (immigration, labor, etc.). And in another case, I asked her to delve into legal theory, summarizing canonical writing on legal indeterminacy by scholars in the Critical Legal Studies tradition. In all of these cases, Dana's research was tremendously helpful, in part because it was so clear and accessible. Dana's writing, especially in her memos, was well structured and incredibly easy to read. She summarized complex legal scholarship written in very different registers, each time with great success, translating sometimes inaccessible writings into clear, ordinary language. To my mind, at least, this is the hallmark of strong legal writing and, in particular, judicial writing (given the importance of communicating complex legal ideas to a general audience through written opinions).

In addition to her exceptional research output, I should add that Dana has been a pleasure to work with interpersonally. She is endlessly energetic and enthusiastic, jumping on new assignments immediately and always asking what more she can do once the initial assignment is complete. And apart from her work, Dana is an exceptionally friendly person while also impressively thoughtful. (During our meetings, for example, I learned a great deal about the formation of LGBTQ identity as she described her independent writing project with Professor Jeannie Suk Gersen; the project sounded fascinating, and Dana was so nuanced and careful in her treatment of the subject.)

Related to the above, I should also say that Dana is someone with a tremendous moral compass. Her commitment to working to advance the public interest, reflected in her professional choices throughout law school, shines through even in casual conversation. Importantly, I do not mean to suggest that Dana comes across as zealous; quite the opposite, Dana is a careful and reflective thinker. At the same time, her decency as a person and her genuine concern for others are so apparent that one cannot help but come away impressed.

While there is more that I could say, I hope that the above makes obvious that I recommend Dana as highly as possible and without reservation. Dana would make an excellent law clerk, and any judicial chambers would be lucky to have her. Please feel free to contact me by phone or email if there is any additional information that I can provide.

Best regards,

Ryan D. Doerfler

Ryan Doerfler - rdoerfler@law.harvard.edu

Dana Abelson

65 Langdon Street #10, Cambridge, MA, 02138
(312) 810-6192 | dabelson@jd24.law.harvard.edu | she/her

WRITING SAMPLE

Independent Writing Project drafted Spring 2023
Supervised by Professor Jeannie Suk Gersen

The attached is an excerpt of a 45-page academic paper arguing that the status-conduct framework is incompatible with the inherent diversity of expression among LGBQ+ people. Although sexuality is largely perceived as a status—*who you are* rather than *what you do*—in recent years, many of the most privileged members of the community have begun to decouple their LGBQ+ sexual activity from their identity and focus on assimilation, challenging that conception.

Because the framework has an inherent flattening effect, ascribing a single characterization to an entire group, the decision of a small number of LGBQ+ people to acculturate has the potential to dramatically limit the protections available to others. As a result, the framework may be transforming from one of LGBQ+ people's greatest legal weapons into one of the biggest dangers facing the movement.

This piece has been unedited by others, except for some conceptual, high-level feedback provided by members of my writing group.

III. The "Good-Bad Homosexual" Dichotomy in the Legal System

While there is no clear data on the number of LGBQ+[1] people that fall into the categories of "good homosexual" or "bad homosexual"[2]—given that they are analytical constructs as opposed to identities—it is clear that there is tremendous diversity in expression and presentation across the community. However, despite this diversity, "good homosexuals" are the segment of the community to which lawyers and judges are most likely to be exposed. Professor Pamela Karlan described the Supreme Court's shift on LGBQ+ rights as the consequence of "the Justices, like the rest of the American people, now [understanding] that LGBT people were their children, their friends, their colleagues, their employees."[3] The fact that the Justices' social circles are different from that of everyday Americans is self-evident: at the time of the *Lawrence* decision, there had been two women and two Black members of the Court, all of whom had attended elite law schools and worked in prestigious jobs prior to their appointments.[4]

To the extent that current judges and Justices interact with LGBQ+ people, those to whom they are exposed are likely to be some combination of white, elite, and politically powerful. This is

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[1] This Article will use LGBQ+ to refer to lesbian, gay, bisexual, and queer people, as well as a more expansive catch-all for anyone else who may identify as non-heterosexual. The more commonly-used "LGBTQ" will only be utilized when citing or referencing specific claims that involve transgender people, since this Article concerns sexuality rather than gender.

[2] These terms are discussed in more depth earlier in the full Article, but in brief, the "good homosexual" abides by what Professor Marc Spindelman has termed the "like straight" motivation—by acting as though they are "just like heterosexuals," LGBQ+ people could secure "all the rights heterosexuals receive, and for the same reasons." The "good homosexual" embraces mainstream cultural norms and the heterosexual hegemony, including "conservative politics, conventional sexual mores, and traditional gender performances." *See, e.g.*, Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619 (2004). The "bad homosexual" is almost exclusively invoked as a "shadow" to the image of the "good homosexual"—as Professor Michael Warner has written, they are "the kind who has sex, who talks about it, and who builds with other queers a way of life that ordinary folk do not understand or control." The oft-chanted "we're here, we're queer, get used to it" exemplifies this notion: queerness asserts "in-your-face difference, with an edge of separatism." *See, e.g.*, Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 52 GLQ: J. LESBIAN & GAY STUD. 119, 123 (1999).

[3] Pamela Karlan, *Just Desserts: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 SUP. CT. REV. 145, 155 (2018).

[4] *See* Amber Phillips, *How Supreme Court Diversity Has Shaped American Life*, WASH. POST (Feb. 11, 2022), https://www.washingtonpost.com/politics/interactive/2022/supreme-court-class-photos-diversity/.

amplified by the fact that the most socially and economically privileged LGBQ+ people are most likely to either have the means to obtain legal counsel or to be "strategically chosen" to be plaintiffs in test litigation to "enhance ([w]hite) public sympathies for the movement's goals."[5] This is also exacerbated by the fact that, with few exceptions, those in leadership at large LGBTQ+ advocacy organizations tend to be white and middle class.[6] For example, while there have been some changes over the past decade, a 2011 survey of the forty largest LGBTQ+ advocacy organizations found that only two were led by people of color, and both were organizations specifically formed to represent racial minorities.[7]

The Court does occasionally see LGBQ+ people who do not embody "assimilated and respectable traits,"[8] but in those rare cases, they are often unreceptive. In an analysis of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Professor Jeremiah Ho wrote that the plaintiffs played with androgyny, repeatedly displayed their sexuality in public, did not have caretaking obligations for children or relatives, and did not present themselves as having sufficiently respectable jobs or careers.[9] As a result, the customers appeared threatening to the heteronormative status quo in ways that the *Obergefell* plaintiffs were not—and, in the words of Professor Ho, "[t]heir perceived nonconformity cost them more than just cake."[10] As Professor Kenji Yoshino has noted, our legal system regularly punishes those who do not cover, or downplay, their identity.[11] In custody and visitation cases, as well as cases regarding employment in the civil service, legal actors constantly predicate entitlements on

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[5] *See* Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, WIS. L. REV., 655, 661 (2016); Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, MINN. J. LAW & INEQ. 117, 123 (2013).
[6] Joseph Nicholas DeFilippis, *"What About the Rest of Us?" An Overview of LGBT Poverty Issues and a Call to Action*, 27 J. PROGRESSIVE HUM. SERVS. 143, 145 (2016).
[7] *Id.*
[8] Jeremiah Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J. LAW & FEM. 249, 323 (2020).
[9] *Id.*; Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).
[10] *Id.*
[11] Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 772, 850 (2002). Yoshino also noted that covering occurs "when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation." For example, she might "(1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism." *Id.* at 772.

whether an LGBQ+ individual is "discreet" or "private"—in which case they can keep their children and jobs—or "open and notorious."[12] Individuals who do not adequately cover face significant harms.

Consequently, courts are often making decisions about whether LGBQ+ people deserve Fourteenth Amendment protection based upon claims brought by a narrow subset of the community—and, in particular, its most privileged members. And because white elites are far more likely to deliberately minimize the importance of their sexualities in the process of acculturating, it is highly likely that a court's assessment of whether a privileged plaintiff's sexuality constitutes *status* or *conduct* would not be representative of the community as a whole. This will have considerable implications for the constitutional protections LGBQ+ people as a group will receive.

IV. Implications of Status-Conduct Framework on Constitutional Protection

The vast majority of constitutional challenges to sexual orientation-related laws are brought under the Fourteenth Amendment and, in particular, the Equal Protection and Due Process clauses.[13] Under both clauses, individuals and groups are protected from government action threatening human life, liberty, or differential treatment of similarly-situated persons—and, if the court finds a "suspect classification" in equal protection or a "fundamental interest" in due process cases, the affected people may receive the strictest of safeguards.[14]

While lawyers may bring cases that only include one of these claims, the analyses "exist in somewhat parallel universes," and thus, legal challenges "often involv[e] claims under both constitutional provisions."[15] Justice Anthony Kennedy noted this in his *Obergefell* opinion, which in some ways tied the concepts of equal protection and due process together: "Rights implicit in liberty

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[12] *Id.* at 850.
[13] Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL'Y 493, 499 (2015).
[14] *See* Francisco Valdes, *The Status/Conduct Distinction and Sexual Orientation: Exploring a Constitutional Conundrum*, 50 GUILD PRAC. 65, 66 (1993).
[15] Sobel, *supra* note 12, at 503.

and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. … [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[16] In both equal protection and due process cases, the status-conduct framework has taken center stage, since the group's categorization is often treated as determinative of whether individuals qualify for protection. Consequently, changing interpretations of how LGBQ+ identity should be characterized pose a considerable threat to the advancement of queer rights.

Importantly, Justice Neil Gorsuch's opinion in *Bostock v. Clayton County* seems to conflate status and conduct in relation to both LGBQ+ people and transgender people.[17] While referencing specific instances of conduct—like dating someone of the same gender, dressing in accordance with one's gender identity, or participating in a gay recreational softball league, like Gerald Bostock did—Gorsuch states that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions."[18] However, this decision was rooted in Title VII rather than the Fourteenth Amendment.[19] Consequently, the applicability of Justice Gorsuch's analysis to constitutional issues is an open question and, thus, this paper will discuss the implications of the status-conduct framework on the Fourteenth Amendment without taking the opinion into account.

a. Equal Protection

Within the status-conduct framework, LGBQ+ people are only able to advocate for treatment as a suspect class if their identity is viewed as a *status* rather than *conduct*—however, even then, they are

[16] Obergefell v. Hodges, 576 U.S. 644, 672, 675 (2015); *See also* Deborah Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2084 (2017) (describing *Obergefell* as asserting the idea of a "synergy" between liberty and equality).
[17] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020).
[18] *Id.*
[19] *Id.* at 1737.

almost never given heightened constitutional protection under the Equal Protection Clause.[20] In accordance with the Clause, the government is unable to use certain personal traits, like race or national origin, as a means of judgment or classification when these traits are irrelevant to a person's capabilities to contribute to society.[21] In determining whether a law should be subject to "strict" or "heightened" review, the Supreme Court must assess whether the group is a "discrete and insular minori[ty]" in line with footnote four of *United States v. Carolene Products Co.*[22] The Supreme Court promises "searching judicial inquiry" for groups who have historically been subject to discrimination; exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; or are a minority or politically powerless.[23] Using this standard, *conduct* alone would not qualify a group for protection—heightened review relies upon the notion that there is a uniform group of similarly-identified people.[24] When assessed as a *status*, success is mixed. Courts generally do not deny that LGBQ+ people have historically faced discrimination, nor that they are a minority, so the debate has often turned on either the issue of immutability—whether a person can change—or political power.[25]

Immutability used to be the central inquiry in this equal protection analysis, with courts regularly concluding that homosexuality was mutable[26]—except for in immigration and asylum cases, where homosexuality has long been recognized as an immutable status worthy of protection.[27] While

[20] *See* Daniel Galvin, *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation is Long Overdue*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 405, 419–22 (2019).
[21] *See* Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 274 (1992).
[22] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).
[23] *Id.*, *see also* Bowen v. Gilliard, 483 U.S. 587, 602 (1987).
[24] *Carolene*, 304 U.S. at 152–53 n.4.
[25] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003); High Tech Gays v. Def. Ind. Sec. Clearance Off., 895 F.2d 563, 573 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 465–66 (7th Cir. 1989).
[26] *See, e.g.*, Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Members of recognized suspect classes…exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."); Conaway v. Deane, 932 A.2d 571, 614 (Md. 2007) ("[W]e are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class.")
[27] Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).

the inquiry's prevalence has lessened in recent years, as courts have more often concluded that sexual orientation is immutable,[28] it remains controversial among scholars.[29] Professor Janet Halley, for example, noted that perceptions of mutability stem from society's use of legal deterrents to encourage individuals to "act or appear heterosexual despite the actual complexity of their sexual lives."[30] Consequently, she notes that "[m]utability of this sort is a product of antihomosexual discrimination and should not be allowed to become a justification for the denial of equal protection."[31] As a result, while the Supreme Court still treats immutability as something a person cannot change, several lower court decisions have reframed the discussion of immutability to encompass traits "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them."[32] If this interpretation were more widespread, it would be easier for LGBQ+ people to qualify as a suspect class and receive constitutional protection.[33] However, if the Court becomes more hesitant to recognize LGBQ+ people as a discrete group—due to shifts in how closely some people associate their sexual activity and identity—access to heightened constitutional protection could be limited.

Political powerlessness has become the center of attention in recent years, though arguments on these grounds have been largely unsuccessful.[34] That does not stop people from trying, though,

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[28] Raelyn Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, GEO. J. GENDER & L. 49, 91 (2018).
[29] *See generally* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L. J. 485 (1998).
[30] Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 963 (1989).
[31] *Id.*
[32] *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring).
[33] LGBQ+ people can, and do, receive some constitutional protection even if they are not treated as a suspect class. For example, in *Romer v. Evans*, a Colorado referendum (Amendment 2) was passed that prohibited government action meant to protect LGBQ+ people, either at the state or local level. The Court in *Romer* invalidated the referendum under rational basis review, finding that the law could not be justified even under the most deferential of standards. 517 U.S. 620, 623, 632 (1996).
[34] *See, e.g.*, Reply Brief of Petitioners at 9, *Romer*, 517 U.S. (No. 94-1039) (citation omitted); Evans v. Romer, 882 P.2d 1335, 1366 (Colo. 1994) (Erickson, J., dissenting). *But see Conaway*, 932 A.2d at 609 ("[W]e shall not hold that gay and lesbian persons are so politically powerless that they constitute a suspect class.")

and both judges in dissent and briefs submitted by parties regularly argue that LGBQ+ people should be exempt from treatment as a suspect class because they have built networks of advocacy organizations, amassed funding, and won legislative victories.[35] This argument has often relied on unreliable or false data concerning "gay wealth" and, as verbalized by Justice Antonin Scalia in his dissent in *Romer v. Evans*, relies on the notion that the Court is imposing upon all Americans "the resolution favored by the elite class from which the Members of this institution are selected."[36] In analyzing Justice Scalia's numerous anti-LGBQ+ dissents, Professor Anthony Michael Kreis described the Justice as "couch[ing] homosexuality among the vestiges of elite privilege" and consequently "treat[ing] same-sex conduct as the equivalent of playing a game of squash at the country club."[37] In addition to relying on falsities, this political powerlessness argument goes directly to Professor Halley's point about the counterintuitive nature of using the community's response to anti-LGBQ+ discrimination to deny equal protection.[38] The LGBQ+ community has taken considerable steps to fight homophobia—arguably necessary given the violence and discrimination faced by many LGBQ+ people on a regular basis—and using that advocacy to deny equal protection is antithetical to the purpose of the doctrine.

b. Due Process

The Court has often given heightened protection under the Due Process Clause to LGBQ+ people when their identity is viewed as a *status* rather than a *conduct*—however, as this characterization becomes less stable, it is possible that the status-conduct framework may be used to roll back some of these rights. The Clause "protects against laws that limit a group's ability to exercise a fundamental

[35] *See Evans*, 882 P.2d 1366; *Conaway*, 932 A.2d at 609.
[36] Kreis, *supra* note 5, at 147–8; *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).
[37] Kreis, *supra* note 5, at 148.
[38] *See supra* notes 29–30 and associated text.

right,"[39] with the Court defining fundamental rights as "those fundamental liberties that are implicit in the concept of ordered liberty … [and] those liberties that are deeply rooted in this Nation's history and tradition."[40]

In *Bowers*, which was the guiding precedent for sexuality-related due process cases for almost twenty years, the Court asked whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy" and found that it did not.[41] On its face, the Court assessed this case as a question of *conduct*—whether a specific group of people could engage in a brand of outlawed behavior. Under this analysis, it would not matter *who* was trying to engage in homosexual sodomy, just that homosexual sodomy was occurring—and that action itself was sufficiently disqualifying. This dichotomy was echoed in the Justices' private writings as well: as Justice Lewis Powell was reconsidering his vote for the majority decision and contemplating whether to frame LGBQ+ identity as a status—a path he did not ultimately take—Justice Warren Burger wrote him a memo arguing that "even if homosexuality is somehow conditioned, the decision to commit an act of sodomy is a choice, pure and simple—maybe not so pure!"[42] However, while purporting to be about conduct, the Court ended up using imprecise language in its decision, with Justice Byron White frequently alternating between condemnations of "homosexual sodomy" and the rights of "homosexuals," thus blending the two concepts. Consequently, while the case made clear that LGBQ+ *conduct* was not worthy of heightened protection, it muddied the waters of whether LGBQ+ *status* could be.

Bowers was ultimately overruled by *Lawrence v. Texas*, in which the Court made clear that LGBQ+ individuals' rights encompassed conduct as incident to status.[43] As the Court wrote, "When

[39] Diane Meier, *Gender Trouble in the Law: Arguments against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 147, 155 (2008).
[40] *Bowers*, 478 U.S. at 191–92.
[41] *Id.* at 190–91.
[42] Kreis, *supra* note 5, at 128–9.
[43] *See Lawrence*, 539 U.S. at 566.

sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[44] Justice Sandra Day O'Connor's concurring opinion further emphasized that interconnectedness, arguing that "the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[45] *Lawrence* made clear that by criminalizing an LGBQ+ individual's private sexual behavior, the government was demeaning their identity in a way that violated due process—but, notably, this decision may have come out differently if same-gender sexual activity were viewed as less intrinsically tied with status.

Thus, due process cases are subject to the same vulnerabilities as those implicating equal protection concerns—if the Court wavers on how to characterize LGBQ+ identity, LGBQ+ people's access to constitutional protection wavers as well. Consequently, the instability of the status-conduct framework puts the advancement of LGBQ+ rights at risk.

V. Concerns with Status-Conduct Framework

The status-conduct framework has long been invoked to safeguard the rights of LGBQ+ people—as conduct itself remained subject to threats of criminal liability,[46] there was solace in the notion that LGBQ+ people could have their identities recognized as a *status*. But the framework now appears to pose greater dangers than protections. As discussed repeatedly throughout this paper, LGBQ+ people cannot be placed into one neat category. For every typical "good homosexual," there is another white, wealthy elite who views their queerness as a central part of their identity—sometimes to protect from accusations of privilege, racial or otherwise.[47] And for every young, radical "bad

[44] *Id.*
[45] *Id.* at 583 (O'Connor, J., concurring).
[46] *See* ACLU, *History of Sodomy Laws and Strategy that Led to the* Lawrence *Decision*, https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision (last visited May 11, 2023).
[47] *See generally* Nicholas Havey, *"I Can't Be Racist, I'm Gay": Exploring Queer White Men's Views on Race and Racism*, 7 J. COMMITTED TO SOC. CHANGE ON RACE & ETH. 137 (2021).

homosexual," there is another person with the same demographics and value set who would prefer to treat their sexual identity as a small facet of their identity. The status-conduct framework, which prescribes how the community at large should be treated, is undoubtedly going to discount vast swaths of the community—accordingly, dramatically limiting some individuals' rights. And that will only continue as the LGBQ+ community becomes more diverse.[48]

a. Dangers Specific to Variance in Expression

As discussed in section III, each individual interprets and expresses their sexuality in different ways—and for some people, cultural shifts have allowed for their same-gender activity to be a "thread" rather than a core aspect of their identity.[49] Because of the fissure that has developed between those individuals and those who do not have the option nor the inclination to shed this identity, it is difficult to conceptualize how the Court will situate sexuality-related constitutional issues within the status-conduct framework.

Generally, in determining whether a group is entitled to heightened protections under the Fourteenth Amendment, courts purport to look at the entire class—not just the person whose rights are at issue in that specific piece of litigation.[50] Put differently, in determining whether LGBQ+ people are a suspect class, for example, the courts consider whether LGBQ+ people *as a whole* have faced discrimination throughout history. LGBQ+ people as a whole have undoubtedly faced discrimination and unquestionably still do. However, as has been discussed repeatedly throughout this paper, the LGBQ+ community is not a monolith and never has been, so community history and present-day experience differs at the margins. If judges primarily see LGBQ+ people as white, elite, politically potent, and "otherwise-straight people who engage in same-gender activity," they may be more likely

[48] *See* Jeffrey Jones, *Growing LGBT ID Seen Across Major U.S. Racial, Ethnic Groups*, GALLUP (June 8, 2022), https://news.gallup.com/poll/393464/growing-lgbt-seen-across-major-racial-ethnic-groups.aspx
[49] Steven Seidman et al., *Beyond the Closet? The Changing Social Meaning of Homosexuality in the United States*, 2 SEXUALITIES 9, 29 (1999).
[50] *See Carolene*, 304 U.S. at 152–53 n.4.

to infer that historical discrimination is over. They may find that LGBQ+ people are politically powerful, and that the community is not particularly discrete. They may find that same-gender sexual activity is not particularly connected with someone's identity, which would turn *Lawrence* on its head. Each of these outcomes is deeply concerning.

Since plaintiffs are convenient figureheads for the causes they represent, it is also possible that judges will take into account the person bringing the case. In that instance, judges' views of the community at large are based solely on an individual or small interest group—again, a significant issue in light of the diversity in expression among LGBQ+ people. Someone cannot possibly get a sense of what millions of people are like based on the experience of a few. However, the status-conduct framework requires judges to make that determination. Judges base their community-wide determination on those who either have the resources to bring cases or are strategically chosen by litigators "to present an 'uncomplicated' or 'pure' discrimination case [since these clients] but for their sexual orientation would not have fallen victim to discrimination."[51] In these cases, too, the judge may more easily conclude that sexuality is less central to identity than it actually *is* for millions of people.

These determinations present an important institutional competence question: why are courts the right actors to decide how much of someone's identity is constituted by their sexuality? While individuals spend decades constructing their own identities, because of the legal structures we have created, that sense of self pales in comparison to how others label them. Even if someone labels themselves "post-gay,"[52] society may still view them first and foremost as a gay person and treat them

[51] Leachman, *supra* note 5, at 661. See, for example, Edie Windsor of *Windsor v. United States*. Luke Taylor, *The Trouble with* Windsor, 23 GRIFFITH L. REV. 519, 528 (2014); Ariel Levy, *The Perfect Wife*, THE NEW YORKER (Sep. 23, 2013), https://www.newyorker.com/magazine/2013/09/30/the-perfect-wife.

[52] Coined in the late 1990s in Great Britain, the term "post-gay" was brought to the United States by *Out* magazine editor James Collard in 1998, who used it to defend his claim that "we should no longer define ourselves in terms of our sexuality—even if our opponents do." *See* Amir Ghaziani, *Post-Gay Collective Identity Construction*, 58 SOC. PROBS. 99, 99 (2011).

accordingly—with all the associated discrimination.[53] Does it matter in court whether an LGBQ+ person views themselves as "just like everyone else"? That is unclear under this framework.

Furthermore, does it even matter that most individuals have inconsistent determinations of their own identities? As noted by Professor Steven Seidman, in the course of his interviews with LGBQ+ people, "an apparent contradiction surfaced between assertions of the centrality of a gay identity and reported social practices."[54] For example, one of his interviewees stated that "'being gay is who I am'"—yet Professor Seidman noted that the interviewee hardly participated in gay culture, his closest friends were heterosexual, and his life seemingly did not revolve around his sexuality at all.[55] That makes sense: humans are complex and our actions often do not match our words. And yet courts are constantly forced to decide "which traits (or actions) are so integral to a person that they constitute an element of personal identity (status)."[56] Judges, though, are not psychologists or experts in sexuality: they have views regarding personal identity just like the rest of us, with a key difference. They get to "impose their views…on an entire country by invoking status/conduct binaries."[57]

This dynamic has always existed, and certainly is not limited to the area of constitutional protections for sexuality, since judges often make consequential decisions on topics on which they are not experts. But it is becoming a much bigger concern as LGBQ+ communities become more diverse and the "post-gay" wing of the community gets stronger. As a result, in the process of trying unsuccessfully to flatten a complex identity into a monolithic body, jurists and other legal professionals risk silencing those who are not the primary choice for representation. And, often, those are the LGBQ+ people who most need legal protections.

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[53] Kristen Walker, *The Participation of the Law in the Construction of (Homo)Sexuality*, 12 L. CONTEXT: SOCIO-LEGAL J. 52, 70 (1994).
[54] Seidman, *supra* note 48, at 28.
[55] *Id.*
[56] Meier, *supra* note 38, at 163.
[57] *Id.* at 169.

b. Additional Concerns with Framework

While this paper is largely dedicated to exploring the complex—and worrisome—relationship between the status-conduct framework and the LGBQ+ community's diversity in expression, that is far from the framework's only fault. Notably, in treating conduct and status as two separate entities, anti-LGBQ+ advocates and courts alike have been able to allow discrimination against LGBQ+ *status* by using *conduct* as a proxy.[58] A critical example of this linkage is rooted in the military, namely in the Don't Ask Don't Tell ("DADT") policy. Under DADT, leadership could purportedly exclude military personnel from service based solely on the basis of conduct, not status—however, the statute states that a person who *identifies* as LGBQ+ can only continue to serve if they demonstrate they are "not a person who engages in, attempts to engage in, *has a propensity to engage in*, or intends to engage in homosexual acts."[59] Because LGBQ+ identity is defined by sexual attraction, though, "it seems logically incommensurate to argue that one does not have a 'propensity to engage in' conduct when one has admitted the very foundation for engaging in that type of conduct—same-sex attraction."[60]

Federal courts have demonstrated the flimsiness of this distinction: in *Able v. United States*, a case in the Eastern District of New York, the Court wrote that only *three* cases existed in which a declaration of homosexuality did not result in discharge[61]—even when the defendant offered sworn statements that they did not have the intent or propensity to engage in LGBQ+ conduct.[62] As the judge wrote, "Although the Act and the Directives are written in such a manner as to give the impression that there is a principled distinction between the [status and conduct], only a brief critique will demonstrate that in practice no such distinction exists."[63] While some argue that taking the

[58] *See* Hillhouse, *supra* note 27, at 63.
[59] 10 U.S.C. § 654(b) (1993) (emphasis added).
[60] Meier, *supra* note 38, at 158.
[61] 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (vacated on other grounds).
[62] *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1135 (9th Cir. 1997).
[63] *Able*, 880 F. Supp. at 975.

sexuality out of LGBQ+ identity would help counteract the stereotype that LGBQ+ people are "dangerously promiscuous sexual predators," denying the sexual nature of most LGBQ+ relationships denies the reality of people's partnerships.[64] Reliance on the status-conduct distinction in this sense also may fuel arguments by anti-gay activists that same-gender erotic activity "is volitional and that homosexuals can refrain from such behavior."[65]

While there are LGBQ+ people who choose to be celibate—or not to engage in same-gender sexual activity—that small group is often weaponized by anti-LGBQ+ advocates to argue that they can criminalize same-gender *conduct* without entering unconstitutional territory, as they would by criminalizing the whole community. Judge William Pryor, for example, argued against protections for LGBQ+ people by stating that those who link status with conduct actually "disregard the diversity of experiences of gay individuals."[66] In support, he wrote, "some gay individuals may choose not to marry at all … [a]nd other gay individuals choose to enter mixed-orientation marriages," citing an *amicus* brief from "Same-Sex Attracted Men and Their Wives."[67] In other words, as Professor Raelyn Hillhouse remarked, there is nothing unconstitutional about criminalizing gay *conduct* because LGBQ+ individuals "may be married to a straight person of the opposite sex, have no sexual desire for the same-sex, have no same-sex sex, and never date someone of the same sex."[68] Judge Pryor's argument so thoroughly severs conduct from status as to render the concept of LGBQ+ status meaningless.

In the same way that this unnatural split between status and conduct is used to punish LGBQ+ people for acting in accordance with their same-gender attraction, it is also used to protect sympathetic heterosexual defendants after they have "slipped up" and engaged in same-gender sexual activity. For

[64] Teresa Bruce, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1164, 1170–71 (1999).
[65] *Id.* at 1175.
[66] *See* Evans v. Ga. Reg'l Hosp., 850 F. 3d 1248, 1259 (11th Cir. 2017) (Pryor, J. concurring).
[67] *Id.*
[68] Hillhouse, *supra* note 27, at 65.

example, the military's policy before DADT provided that service members found to have engaged in sodomy *may* be discharged, but if they identified as LGBQ+, they *must* be discharged.[69] The Army's regulations at the time clarified that the ban on LGBQ+ servicemembers did not apply to "persons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, [curiosity], or intoxication."[70] Essentially, if a heterosexual and LGBQ+ soldier engaged in same-gender sexual activity because they were drunk, the heterosexual soldier could remain in the Army, while the LGBQ+ soldier had to be automatically terminated.[71] As Judge Norris articulated in his concurring opinion in *Watkins v. United States Army*, "the regulations do not penalize soldiers for engaging in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay."[72]

Similarly, a case in the New Hampshire Supreme Court found that the definition of "homosexual" in a bill designed to exclude LGBQ+ people from adoption, foster care, and childcare center employment must *not* include those individuals who erred in the distant past—specifically, by having same-gender relations during adolescence—but who now engage in exclusively heterosexual behavior.[73] This is a thinly-veiled effort to protect people who have engaged in LGBQ+ conduct but are "not really" LGBQ+.[74] As Professor Halley articulated, this approach "opens a pocket of legal protection for individuals who obey a prohibition on homosexuality … by appearing straight."[75] As with the references to celibate LGBQ+ individuals, this "'not really' LGBQ+" paradigm is a notable example of the way in which the status-conduct framework has long threatened the LGBQ+ movement, even as it continues to be invoked by advocates to argue for the advancement of rights.

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[69] Valdes, *supra* note 13, at 68.
[70] *Watkins*, 875 F.2d at 715 (Norris, J. concurring) (citing AR 601-280, para. 2-21 note).
[71] *Id.*
[72] *Id.*
[73] *See* Op. of the Justs., 525 A.2d 1095, 1098 (N.H. 1987).
[74] *See* Walker, *supra* note 52, at 63.
[75] Halley, *supra* note 29 at 957–58.

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The Honorable Juan R. Sanchez
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Dear Chief Judge Sanchez:

I am a rising third year law student at The University of Chicago Law School writing to apply for a clerkship in your chambers for the 2024 term. Having grown up on the East Coast I am looking forward to returning back east to clerk.

My time in the Jenner and Block Supreme Court and Appellate Clinic has allowed me to gain firsthand experience with appellate litigation, develop my legal writing experience, and immerse myself in the inner workings of the federal court system. As a member of the clinic, I have had the opportunity to contribute to both Supreme Court merits and amicus briefs. Last summer, I had the opportunity to take the lead on the anticommandeering section of the Brackeen merits brief. That project allowed me to dig into a complicated and fairly new area of the law while developing my legal analysis skills and interrogating many of the broader issues at play in the case. I have also spent ample time following the circuits for potential cert worthy cases and researching and analyzing potential circuit splits allowing me to gain familiarity with wide breadth of current legal issues. My time in the clinic has not only given me the tools and skills to excel as a clerk, it has also made me excited to continue to immerse myself in the work of the United States federal courts through the experience of being a clerk.

My work on the Chicago Journal of International Journal, both in writing my comment and now as an editor and symposium chair, has also helped to further develop my legal writing and analysis skills, broaden my understanding of the law, and affirmed my interest in academia. Writing my comment, which will be published this summer in CJIL's paginated online journal, was one of the highlights of my 2L year. As an articles editor I have had the opportunity to engage with international law and legal scholarship in a serious and rigorous way. My interest in academia and legal scholarship makes a clerkship a natural next step from which I would gain tremendously and my skills as a researcher and passion for legal scholarship would allow me to thrive in this role.

Please find my resume, writing sample, and most recent law school transcript attached for your review. Finally, letters of recommendation from Adam Davidson and Sarah Konsky are also included. If you have any questions, please feel free to contact me at the above address and telephone number. Thank you very much for considering my application.

Respectfully,

Rachel Abrams (She/Her/Hers)

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- Research and draft paper sections, provide line edits and feedback on draft papers

Research Assistant Aug. 2022- Sept. 2022
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Caterer and Meal Coordinator June 2021-July 2021
Dr. Beth Samuels High School Program at the Drisha Institute. West Milford, NJ
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- Tutored in high school math, SAT and ACT, and LSAT test prep, helping students raise standardized test scores improve test taking strategies, developed study plans, and created personalized approaches for each student

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LAWS	30211	Civil Procedure William Hubbard	4	4	176
LAWS	30611	Torts Saul Levmore	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	182

Winter 2022

Course		Description	Attempted	Earned	Grade
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LAWS	30411	Property Thomas Gallanis Jr	4	4	177
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	182

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	181
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	178
LAWS	43220	Critical Race Studies William Hubbard	3	3	178
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182

Summer 2022

Honors/Awards
The Chicago Journal of International Law, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	46101	Administrative Law Thomas Ginsburg	3	3	180
LAWS	50311	U.S. Supreme Court: Theory and Practice Sarah Konsky Michael Scodro	3	3	178
LAWS	53422	Access to Justice Anna-Maria Marshall	3	3	179
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	2	0	
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	179
LAWS	53308	Food Law Omri Ben-Shahar	3	0	
LAWS	81015	Litigation Laboratory Catherine Masters James Clark	3	3	177
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	1	0	
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Date Issued: 06/04/2023

KEY TO TRANSCRIPT ON FINAL PAGE

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THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Rachael Caitlin Abrams
Student ID: 12109379

Scott C. Campbell, University Registrar

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	179
LAWS	47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	177
LAWS	53469	Advanced First Amendment Law Genevieve Lakier	3	0	
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	1	0	
LAWS	94130	The Chicago Journal of International Law	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Send To: Rachel Abrams
918 W Addison St Apt 1F
Chicago, IL
60613-4892

End of University of Chicago Law School

Date Issued: 06/04/2023

KEY TO TRANSCRIPT ON FINAL PAGE

OSCAR / Abrams, Rachael (The University of Chicago Law School)

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)
Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)
Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)
Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)
Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.
Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
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For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

Sarah M. Konsky
Director, Jenner & Block Supreme Court
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e-mail konsky@uchicago.edu

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Rachel Abrams, who just finished her 2L year at the Law School, for a clerkship position.

I have had the opportunity to teach Rachel in two different settings at the Law School: an appellate law clinic and a seminar course. I first met Rachel when she applied for one of the two summer associate positions in our Law School's Supreme Court and Appellate Clinic. (I am one of the directors of that clinic.) Rachel accepted our offer to work full-time in our clinic during her 1L summer, and she also took the clinic for course credit throughout her 2L year.

During her time in the clinic, Rachel has taken on a wide range of appellate projects – from researching legal issues, to drafting portions of Supreme Court briefs, to analyzing legal arguments. Her projects have spanned a wide range of topics, including challenging constitutional and statutory interpretation questions. Rachel has done great work in the clinic. Her legal research and analysis are strong. She is a good legal writer, as well. (Rachel has not yet received a grade for her work in the clinic, as students are graded after they've ended their time in the clinic.)

I also taught Rachel in a seminar course, United States Supreme Court: Theory and Practice, during the Fall Quarter of her 2L year. Rachel was a valuable contributor to our class discussions, and she raised insightful questions and made interesting points during the quarter. She received a strong grade of 178 in the seminar. This grade was based, in large part, on her work on a mock Supreme Court brief and a mock Supreme Court oral argument. These projects can be particularly challenging for 2L students (as Rachel was at the time), who often have less experience with legal writing and argument than their 3L peers in the class. Rachel nevertheless did well on both of these projects.

Based on my work with Rachel, I believe that she already has the legal skills to hit the ground running as a law clerk.

Sincerely,
Sarah M. Konsky

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
davidsona@uchicago.edu | 773-834-1473

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am happy to recommend Rachel Abrams for a clerkship in your chambers. Rachel was a student in my Legal Research and Writing class as a 1L, and I had the pleasure of teaching her for the full year.

Rachel started out her 1L year as a strong writer, and she only improved as the year progressed. I was not surprised in the least when Rachel received 182s and a 181, all strong As in Chicago's grading scheme, in my class. Nor was I surprised when she was offered a position on the Chicago Journal of International Law ("CJIL"), nor when she was selected by the outgoing board to be both an articles editor and the symposium chair.

Indeed, I think that anything I might say would likely understate Rachel's abilities. That is because what made Rachel stand out in my class was her dedication to the process of getting better. She was one of the few students who would regularly meet with me to discuss both her technical writing skills and her burgeoning legal analytical abilities. While many students asked a question here or there, Rachel would not only regularly ask questions as she was working on her assignments, she would go through portions of them with me after she turned them in line by line seeking ways to improve. Given her propensity for systematically seeking to improve, that she will not only have been both a CJIL staffer and a board member but have participated in the school's Supreme Court and Appellate Clinic, bodes incredibly well for her continued upward trajectory as a legal writer and thinker.

But beyond her writing skills, Rachel is also a pleasure to speak with. She is thoughtful and serious, but not so serious that she is unable to appreciate life outside of the law. Indeed, she told me that some of her proudest accomplishments during law school are that she has been able to serve on the young professionals' board of her synagogue and to cook and host shabbat dinners (almost) every weekend.

I believe that Rachel will make an excellent law clerk, and I recommend her without reservation.

Sincerely,

Adam Davidson

I prepared the attached writing sample for my Supreme Court Theory and Practice Seminar at the University of Chicago Law School. In this assignment, I was asked to write a brief in opposition for the United States in the Supreme Court of the United States for a denial of certiorari in the case *United States v. Dish Network L.L.C.*, 954 F.3d 970 (7th Cir. 2020). To create a 15-page writing sample, I omitted the question presented, the introduction, and the statement of the case. In this case the Seventh Circuit held that Dish Network was liable for the TCPA violations of their order-entry retailers because of the contract that existed between the entities. Dish appealed to the Supreme Court, arguing that a finding of vicarious liability through contract is in direct conflict with the holdings of the Ninth and Forth Circuits in similar cases.

REASON FOR DENYING THE PETITION

I. There is No Circuit Split as to How to Determine Agency and Vicarious Liability in Third-Party TCPA Violation Cases

Petitioner argues that in this case the Seventh Circuit has created and applied a completely new standard for establishing agency and in turn vicarious liability in TCPA cases involving third parties and independent contractors, creating a circuit split with the Fourth and Ninth Circuits. This is a gross misunderstanding of the Seventh Circuit's analysis, which can be reconciled with and understood under the same principles governing the judicial decisioning in the other circuit.

A. The Seventh Circuit's finding of agency is grounded in the same principles and foundations as the analysis of the Fourth and Ninth Circuits.

Here, the Seventh Circuit held that the contracts Dish entered into with the Order Entry retailers "gave Dish the right to control their performance" *United States v. Dish Network L.L.C.*, 954 F.3d 970 (7th Cir. 2020) at 975. The various provisions outlining compliance with business rules as well as the underlying contractual authority that Dish had over the Order Entry Retailers, made them "[u]nder normal principles, [ ] Dish's agents notwithstanding the contractual disclaimer." *Id*.

1. Using the contract to establish agency is not a fundamentally different mode of analysis from that of the Ninth and Fourth Circuits

Petitioner argues that basing the vicarious liability analysis on the nature and language of the contract rather than evaluating the relationships under the "four bedrock theories of common law agency" as the Ninth and Fourth Circuit have creates an empirically different test. They claim that such a test would manifest in an abuse of discretion resulting in extraordinary and unfairly large penalties on companies utilizing third-party providers and independent contractor. Pet. Br. at 1. However, all three circuits are governed by the same legal principles put forward by the FCC which they have applied consistently and in lockstep with one another.

The Seventh Circuit has not proposed a new test. Just like the Ninth and Fourth Circuits they have adhered to the overarching principles of agency articulated by the FCC in the context of TCPA vicarious liability and governed by the Restatement (Third) of Agency to determine agency and vicarious liability in cases involving order entry retailers.

Rather than ignoring the "four bedrock theories" in favor of a broader and more liberal understanding of agency, the Seventh Circuit merely argues that here the contract itself meets the requirements for establishing agency without further analysis or deconstruction. *See United States v. Dish,* 954 F.3d at 975. The claim is not that all contracts create agency or even that all contracts establishing business rules do so. It is only that given the nature of this contract the requirements for agency and in turn vicarious liability have been met.

2. The decision in Jones does not create a new test which the Seventh Circuit violates in looking to the contract for agency and vicarious liability.

In *Jones v. Royal Administrative Services,* the Ninth Circuit held that Royal, a company that sells vehicle services contracts (VSCs) could not be held liable when AAAP, a marketing vendor who sold Royal's plans alongside those of other companies, violated the do-not-call provisions of the TCPA while selling VSCs for Royal. *See generally* 887 F.3d 443 (9th Cir. 2018). That circuit reached its conclusion by relying on the "bedrock theories" of agency and engaging in a ten-part balancing test to determine if Royal was vicariously liable for the action of their agent AAAP. *Id* at 450. While Royal and AAAP did have a contract, which helped to establish agency, the contract and the relationship were not of the same nature as those that existed between Dish and its Order Entry Retailers. AAAP sold VSCs for many companies. Their priority was selling VSCs rather than selling VSCs for Royal. *See id* at 451. Their telemarketing approach consisted of first selling the concept of VSCs and then selling Royal's VSCs. *See id* at 446. In contrast, Dish's Order Entry Retailers contractually had to identify

themselves as sellers of Dish products, and many were formed explicitly to sell Dish services and products. App. 79a. Additionally, while the marketing "agreement between Royal and AAAP contained authorized sales and marketing methodologies with which AAAP was required to comply [and] [t]he agreement [e]xpressly excluded from these methodologies ... any act or omission that violates applicable state or federal law, including but not limited to robocalling" it did not require compliance with "business rules." *Jones,* 887 F.3d at 447. Additionally, their relationship with the parent company was more tenuous than that of Dish and its Order Entry Retailers.

The Dish Order Entry Retailers worked directly with Dish's sales team to submit and fulfil orders. App. 70a. They sold Dish products to Dish customers and potential customers. App. 69a. While they made commission based on sales rather than salary, Dish sales and marketing employees' salaries and bonuses were directly tied to Order Entry Retailers' performance. App. 84a. The contracts and subsequent relationship between the entities is therefore fundamentally different, and stronger, than that in *Jones* and as such establishing agency and liability is a more straight forward process. Both cases are operating under the same principles: establish agency and determine if that principal-agent relationship created vicarious liability, but where *Jones* fails to find it in the inherent nature of the parties' business relationship and agreements, here the "normal principles" are obvious and clear. In reading these two cases together it is apparent that the overarching rule is that if normal principles of agency are present, companies can be held vicariously liable under the TCPA for the actions of their independent contractors if they exerted appropriate control over them. The analysis in our case demonstrates that sometimes the relationships and control are obvious from the contracts and business dealings of the two entities and vicarious liability can be derived from these surface level conditions. Implicit in *Jones*

though, is the posture that even when the contracts and dealings fail to meet that standard, further analysis, as outlined in that case, can potentially reveal an agency relationship in which vicarious liability can be found. *See Jones,* 887 F.3d at 450. This is aligned with the FCC's rules which state that "[p]otential liability under general agency-related principles extends beyond classical agency." *See In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules,* 28 F.C.C. Rcd. 6574 (2013) at 6586.

3. *The Fourth Circuit's finding that there was not vicarious liability in Hodgins v. UTC Fire and Security Americas Corp. does not foreclose the possibility of it existing in this case.*

The court in *Hodgins* granted summary judgment for the defendants because the plaintiffs "failed to proffer more than a scintilla of evidence to support" their conclusion that the defendants were vicariously liable for the behavior of the third-party sales retailers. *Hodgin v. UTC Fire & Sec. Americas Corp.,* 885 F.3d 243 (4th Cir. 2018) at 246. In that case the defendants, who both manufacture home security systems, sold the systems to manufacturers who sold them to retailers. *See id.* While the facts regarding the two manufacturers vary slightly, neither was as intimately intwined with the retailers as Dish was with its Order Entry Retailers. "Once UTC sold systems to a distributor, the distributor took full title to the product. Accordingly, UTC did not receive any direct proceeds from a product's resale to a retailer or consumer." *Id.* Similarly, Honeywell did not enter into a sales agreement with the retailers who sold their systems for seven years, and when they later did the agreement "prohibited anyone associated with ISI from making "any representation, whether verbal, written or otherwise, that they [were] a Honeywell employee or an agent of Honeywell or that [ISI] [had] any official association or affiliation with Honeywell." *Id* at 248. Furthermore, when they did receive

complaints, ISI regarding TCPA violations they immediately opened investigations and reasserted to ISI that they could not identify as Honeywell agents. *See id.*

In that case the court held that there was no vicarious liability under a ratification theory because the petitioners had failed to demonstrate "affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." *Id* at 252 (quoting Restatement (Third) of Agency § 4.01(1) (2006)). But the court there did not explicitly or implicitly hold that companies can never be found vicariously liable for the behavior of third-party retailers. The court reiterated that "[a]ccording to the FCC, vicarious liability under the TCPA is governed by the federal common law of agency, 'including not only formal agency, but also principles of apparent authority and ratification.'" *Id (*quoting *Dish Network, LLC*, 28 FCC Rcd. at 6584). However as discussed below the Seventh Circuit is also governed by the FCC rules, and the mode of analysis applied by the court here is well within the parameters of what the FCC rules layout. *See infra* Part B.

B. All the circuits are governed by the FCC's ruling regarding vicarious liability and agency in third-party TCPA violation cases, providing a consistent the framework for analysis.

On the question of vicarious liability under the TCPA, all circuits are governed by the holding of the 2013 FCC ruling concerning the TCPA. *See generally Dish Network, LLC*, 28 FCC Rcd. In response to many complaints filed by various individuals and classes on similar facts to the ones in our case, the FCC held that a "seller may be liable for violations by its representatives under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." *Id* at 6584. In their ruling, the FCC established that independent contractors can have an agency relationship with the seller they are contracting with. As such they can be held liable for their violations of the TCPA under a

variety of agency principles. The FCC also found that "section 227(c)(5) contemplates, at a minimum, the application of such principles of vicarious seller liability for do-not-call violations." *Id.* If agency is established, violations of the do-not-call provisions of the TCPA by third parties can create vicarious liability for the seller.

Nowhere in their ruling does the FCC establish a limited scope of the theories under which agency can be established, or that the language of a contract cannot in and of itself support the claim that a principal-agent relationship has been created. In fact, their ruling repeatedly emphasizes the many avenues and theories by which agency can be established, "leav[ing] open the possibility that we could interpret section 227(c) to provide a broader standard of vicarious liability for do-not-call violations." *Id* at 6586.

The Seventh Circuit, like the Ninth and Fourth Circuits, is governed by and adheres to the FCC's rules and standards regarding vicarious liability in TCPA cases involving third party retailers. They must establish agency and demonstrate that that agency created vicarious liability. Here, the Seventh Circuit did not create a new or novel test for agent liability, but rather held that in the instant case the contract in and of itself established a principal-agent relationship that created vicarious liability without having to do the ten-factor analysis that the Ninth Circuit must parse through in *Jones*.

C. Even within the Ninth Circuit and Fourth Circuit there is no consistent or precedential test, rather they present a variety of approaches governed by the principles of the FCC and the Restatement.

Petitioner also argues that the Seventh Circuit's finding of agency and vicarious liability through the nature and language of the Order Entry Retailer contracts cuts directly against the precedent and holdings of the Ninth and Fourth Circuits. Pet. Br. at 12. This is incorrect. In *Krakauer v. Dish Network, L.L.C.* the Fourth Circuit held that the contract between Dish and its Order Entry Retailer, Satellite Systems Network, did in fact establish a principal-agent

relationship in and of itself. *See generally* 925 F.3d 643 (4th Cir. 2019). That court held that "there are the many provisions of the contract between Dish and SSN affording Dish broad authority over SSN's business, including what technology it used and what records it retained." *Id* at 660. "[S]uch '[a]pparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." *Id*. Here the Fourth Circuit held there was vicarious liability, just as in our case, through the nature of the contract between Dish and its Order Entry Retailer.

Petitioner claims that the Fourth and Ninth Circuit establish a uniform test for vicarious liability. However, if the decisions in *Krakauer* and *Jones* are to be taken as being decided under the same test and mode of analysis, the governing principals must be broader than simply the "four bedrock theories of agency" as petitioner asserts. Given the parallels between the facts in *Krakauer* and our case it seems obvious that the Seventh Circuit's decision here falls under the same rules and tests. As such, the decision can be read in harmony with the decisions of the Fourth and Ninth Circuit without a concern of creating a meaningful circuit split.

Petitioner's argument that the Seventh Circuit's opinion in this case creates an irreconcilable circuit split with the decisions of the Ninth and Fourth Circuit's is unfounded. All three circuits are governed by and adhere to the FCC's ruling that, in the context of the TCPA vicarious liability can be found in cases where agency has been established between a company and its independent contractors. *See Dish Network, LLC*, 28 FCC Rcd. at 6584. While the courts use varying modes of analysis to evaluate the relationships at play, they are all cabined by and understood under normal principles of agency.

The Seventh Circuit's finding of agency and vicarious liability through the language and conduct associated with the Order Entry Retailer contracts is not a divergence from standard modes of analysis in this context, rather it is a shortcut available in this case to make the same assessments the Ninth Circuit used its ten-factor test and "bedrock theories of agencies" to make in *Jones*. Here the language and behavior tied to the contract was enough to reach the appropriate conclusions, but in cases where it is not or where the contract does not demonstrate clear agency, the Ninth Circuit provides a second line of defense to ensure full and complete analysis even in more complicated cases. Furthermore, deriving liability and agency from a contract with an Order Entry Retailer is not outside the scope of these other circuits. The Fourth Circuit has itself used this mode of analysis without creating any noted conflict with prior holding of that court or the Ninth Circuit.

II. The Outcome in this Case would be Identical Even Applying the Methods of Analysis Utilized by the Ninth Circuit

Even if, as the petitioner asserts, the Seventh Circuit presents a fundamentally different and incorrect test for determining vicarious liability for third parties in TCPA cases, the outcome under the analysis presented by the Ninth Circuit would be identical. Because the finding of vicarious liability would remain regardless of the test applied, there is no reason for the Supreme Court to grant certiorari in this case.

A. There is vicarious liability under the *Jones* factors.

The Ninth Circuit has held that "[a] defendant is vicariously liable for violations of the TCPA where common law principles of agency would impose it." *Jones*, 887 F.3d at 450. That court has also held that there are several paths to establishing this vicarious liability corresponding with "the bedrock theories of agency: actual authority, apparent authority, ratification, and employment (respondeat superior)." *Id* at 449. Because "[a]ctual authority is

limited to actions 'specifically mentioned to be done in a written or oral communication' or 'consistent with' a principal's 'general statement of what the agent is supposed to do'" and the contract both explicitly stated that the Order Entry Retailers were independent contractors and that they were forbidden from violating the TCPA it would be difficult to argue that Dish was liable under a theory of actual authority. *Id*. However, the Ninth Circuit held that the "extent of control exercised by the [principal] is the essential ingredient." *Id*. As such they adopted "ten factors for determining whether a principal has enough authority to control the actions of its agent such that the principal may be held vicariously liable . . . for the conduct of its employee." *Id* at 450. These factors are:1) the control exerted by the employer, 2) whether the one employed is engaged in a distinct occupation, 3) whether the work is normally done under the supervision of an employer, 4) the skill required, 5) whether the employer supplies tools and instrumentalities [and the place of work], 6) the length of time employed, 7) whether payment is by time or by the job, 8) whether the work is in the regular business of the employer, 9) the subjective intent of the parties, and 10) whether the employer is or is not in business. *Id*.

In balancing these ten factors, Dish is vicariously liable for the Order Entry Retailers violations of the TCPA. Dish exerted considerable control over the Order Entry Retailers. App. 73a-75a. While the retailers set up their own offices, they were clearly governed by Dish. Dish laid out what they were and were not allowed to sell, had managers who oversaw the order entry program, and required the retailers to use a Dish specific database and management program. App. 71a. Dish employed disciplinary measures and the sales department sought out potential Order Entry Retailers. App. 80a. The program was also quite small. There were only about 30 Order Entry Retailers at any given time. App. 73a.

While just like in *Jones*, Dish did not set the hours the telemarketers worked or set quotas for the number of calls they had to make, the relationship between Dish and its Order Entry Retailers was fundamentally different than that of Royal and AAAP. AAAP sold VSCs for Royal among many others, and Royal did not explicitly seek out AAAP as part of its global sales plan. *See Jones*, 887 F.3d at 452. The relationship between Dish and its Order Entry Retailers was much more like that of employer and employee than it was to company and subcontractor. Even though the Order Entry Retailers worked in their own offices far from Dish's corporate headquarters, account managers and field representatives were intimately involved in their day-to-day activities, providing training and marketing materials, pitching ideas, and retaining record and audit rights. App. 83a-84a. Dish, unlike Royal, had control over the telemarketing calls. The Order Entry Retailers were required to identify themselves as Dish retailers and were highly regulated and restricted in what and how they could sell Dish services. App. 79a.

The Order Entry Retailers were also not engaged in a distinct occupation. These retailers were under contract with Dish to sell Dish products. App. 75a. Many of them even included "Dish" in their company names. App. 108a. Additionally Dish's employees, as explained above did engage with and supervise the Order Entry Retailers to an extent. App. 83a-84a. Dish oversaw disciplinary action of the Order Entry Retailers, retail sales compensation for Dish employees was tied to activations by Order Entry Retailers under their supervision, and as they noticed misconduct on the part of Order Entry Retailers, Dish imposed more control including weekly evaluations, a quality assurance program, and adding additional business rules. App. 405a. As such the relationship was robust as evaluated under factors two and three.

Just as in *Jones* "the record does not contain any evidence regarding the skill required to place the calls . . . [t]herefore, we do not consider this factor in our analysis." 887 F.3d at 452.

Regarding factor five, while the sale department and account managers did provide scripts, guidance, and suggestions to the Order Entry Retailers, and provided them with parameters of what they could and could not sell, the Order Entry Retailers were responsible for establishing and outfitting their own offices. App. 120a. As such the Order Entry retailers fail to satisfy the fifth factor, but no single factor is dispositive when determining vicarious liability. Rather, the factors when taken together must demonstrate a certain level of control and authority. Therefore, the analysis can continue. *See Jones*, 887 F.3d at 452. The record gives no indication that the contracts Dish entered into with the Order Entry Retailers were for set periods of time like the contract in *Jones*. What is known is that the Order Entry Retailers were contractors expected to comply with all business rules. App. 75a. Just like in *Jones* payment to the Order Entry Retailers was based on commission rather than salary, however in contrast to the arrangement between Royal and AAAP, here retail sales compensation for many Dish employees was tied to new activations by Order Entry Retailers. App. 84a. So, while the sixth factor seemingly provides the same results here as in *Jones* the nature of the economic relationship between Dish and its Order Entry Retailers is fundamentally different and tips the scale towards liability.

Dish is in the business of selling and installing satellite television plans and products. They contracted out the sales portion of their business to these Order Entry Retailers. App. 70a. Therefore, the Order Entry Retailer's sales are a normal part of Dish's business. "Thus, this factor tends to show control akin to that found in an employer-employee relationship." *Jones*, 887 F.3d at 453. We do not have enough information to conclusively state the Order Entry Retailers' subjective intent but given that many of them carried Dish's name as part of their brand, or were established specifically to sell Dish products, it seems likely that their intent was

to work as sales representatives of Dish. Finally with regard to the tenth factor, Dish is still in business, which suggests a greater level of control.

When taken together these ten factors indicate that the relationship between Dish and its Order Entry Retailers was akin to that of employer and employee. They exerted control over them through contracts and supervision, had significant reliance interests both because of the service they provided and the retail sales compensation scheme, and they functioned and identified as sales representatives of Dish when engaging with customers. Therefore, under *Jones*, Dish had enough authority to control the Order Entry Retailers' work to hold Dish vicariously liable as if it were an employer of the Order Entry Retailers.

B. DISH is vicariously liable under a ratification theory of agency.

Not only do the facts of our case satisfy the *Jones* test, but there are also other theories of agency under which Dish could be found vicariously liable. In *Kristensen v. Credit Payment Services Inc.,* the Ninth Circuit elaborated on the ratification theory of agency. *See generally* 879 F.3d 1010 (9th Cir. 2018). Using the Restatement as its guide, the court held that an act is ratifiable "if the actor acted or purported to act as an agent on the person's behalf." *Id* at 1014 (quoting Restatement (Third) of Agency § 4.03). And as such, "a principal has assumed the risk of lack of knowledge if 'the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation.'" *Id* (quoting Restatement (Third) of Agency § 4.01). While in that case the plaintiffs failed to provide the necessary evidence to demonstrate ratification, this case clearly satisfies the necessary components.

We know from prior cases that a contract can create agency. *See Krakauer,* 925 F.3d. at 660. The contract under which the Order Entry Retailers operated clear did so. They were obligated to comply with Dish's requests for action and inaction, were subject to audits, and

required to comply with all business rules. The record therefor establishes that Dish and its Order Entry Retailers had a principal-agent relationship. Unlike the credit payment services in *Kristensen* which did not enter into contracts with, or even communicate with AC Referrals prior to the plaintiffs bringing suit, Dish and its order entry retailers had a contractual and mutually beneficial relationship prior to the TCPA violations. *See Kristensen,* 879 F.3d. at 1014.

The record also clearly demonstrates that Dish was aware and complicit in the Order Entry Retailer's TCPA violations. App. 405a. Dish repeatedly received complaints that Order Entry Retailers were calling individuals on both the national and internal do-not-call registries. App. 90a. While they sometimes reprimanded or investigated these complaints, when the Order Entry Retailers would provide an explanation or excuse for the behavior, Dish without further disciplinary action. App. 92a. Even when Dish launched their quality assurance program to monitor the Order Entry Retailers, they focused primarily on eliminating fraud rather than regulating telemarketing and adherence to the TCPA. App. 99a. This makes sense given that the fraud was negatively affecting Dish's financial standing whereas the TCPA violations were likely having the opposite effect.

Not only did Dish do nothing to prevent the Order Entry Retailer's do-no-call list violations, but they also were aware they were occurring and did nothing to reprimand or intervene. App. 405a. Under the order entry contracts Dish had the right and ability to reprimand and even dismiss Order Entry Retailers for failing to comply with business rules and the law. App. 84a. Even when the TCPA violations were brought to their attention though, Dish chose instead to pursue the issues on an ad hoc case-by-case basis and take Order Entry Retailers at their word when they explained away their behavior. App. 107a. Dish was repeatedly informed by angry and frustrated individuals as well as Dish employees, that Order Entry Retailers were

violating the TCPA and making telemarketing calls to individuals on the various national and internal do-not-call lists. App. 111a. This scenario is only made worse with the knowledge that Dish had incentive to ignore the complaints, because the violations led to more activations which resulted in more revenue for Dish.

Dish ratified the actions of their Order Entry Retailers, who were acting as their agents. They knew about the complaints against the Order Entry Retailers regarding the TCPA violations, and they chose to not take appropriate disciplinary action. Instead, they allowed the behavior to continue. App. 103a. Even as they began to crack down on quality assurance for preventing fraud, they did not take analogous steps to protect against TCPA violations. *See id.* They took the excuses of the Order Entry Retailers at face value and allowed them to continue making illegal telemarketing calls to individuals on the do-not-call lists. App. 107a.

Under a variety of theories Dish is liable for the action of their Order Entry Retailers. Both the written contracts and the conduct engaged in by Dish and the Order Entry Retailers help to establish a principal-agent relationship between the two, giving Dish a significant amount of agency. This agency and the vicarious liability that flows from it are further evidenced by the evaluation of the facts under the Ninth Circuit's *Jones* test. Under that precedent Dish has certainly exerted enough authority to satisfy the requirements for vicarious liability.

There is also a strong case for vicarious liability under a ratification theory of agency, one of the "four bedrock theories" that the petitioners claim create the split between the Fourth and Ninth Circuits' analysis and the Seventh Circuit's decision below. *See Jones,* 887 F.3d at 449. Dish knew what its agents, the Order Entry retailers, were doing and that their behavior was in violation of the TCPA, and they chose to at the least ignore it, and likely even encourage it. They had financial incentives to allow the violations to continue and despite having the authority to

discipline and dismiss the Order Entry Retailers for such behavior they often did not. Regardless of what test or mode of analysis is used, Dish is vicariously liable for the Order Entry Retailers' TCPA violations. The result is the same even if the law is different and as such there is no need for the Court to grant certiorari.

Applicant Details

First Name	**Gabrielle**
Last Name	**Acosta**
Citizenship Status	**U. S. Citizen**
Email Address	**gabrielle.hamilton@ou.edu**
Address	**Address** Street **620 Lake Vista Lane** City **Lavon** State/Territory **Texas** Zip **75166** Country **United States**
Contact Phone Number	**3253303812**

Applicant Education

BA/BS From	**Texas A&M University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 12, 2024**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**Oil & Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tovino, Stacey
stacey.tovino@ou.edu
8322896313
Krishnamurthi, Guha
guha.krishnamurthi@ou.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Gabrielle Acosta
gabrielle.hamilton@ou.edu | (325) 330-3812 | 620 Lake Vista Lane, Lavon, TX 75166

June 7, 2023

The Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sanchez

I am an incoming third-year law student at the University of Oklahoma College of Law. I am writing to apply for a judicial clerkship in your chambers for the 2024-2025 term. I am applying to you with the hopes of continuing to grow my legal career in Philadelphia, a place where I am excited to explore and learn more about. My experience at the Oklahoma Attorney General's Office conducting legal research and drafting briefs submitted to the Oklahoma Court of Criminal Appeals last summer inspired me to apply for a judicial clerkship in your chambers. I know that my academic accomplishments, writing skills, and previous experiences will enable me to be a valuable asset to your chambers.

Before law school I attended the Junior Statesman of America camp hosted at Georgetown University, where I studied under esteemed professors and learned from many political figures in the Washington D.C. area. This experience taught me how important our federal system is and inspired me to attend law school. During my time at the University of Oklahoma College of Law, I have earned the American Jurisprudence Award for the Top Grade in Constitutional law, earned positions on the Dean's Honor Roll for multiple semesters, and have maintained standing in the top 30% of my class. Additionally, I plan on taking Federal Courts during the Spring 2024 semester.

Because of my exemplary grades, I was offered a position on our *Oil & Gas, Natural Resources, and Energy* Law Review Journal (ONE-J). In my time as a member, my writing skills have led me to success. Most recently, my student article, *Major Questions Arising from the Major Questions Doctrine: A Look into the Ramifications of West Virginia v. EPA on Climate Change Regulations*, was selected for publication in ONE-J's spring issue. This article focuses on the Major Questions Doctrine and how it will impact further federal agency action – a topic currently on the cutting edge of an intersection between constitutional law and agency action regarding environmental concerns. Throughout the writing process, I navigated through decades of Supreme Court precedent on interpretation of Congressional authorizations to federal agencies and produced a thorough look into the potential outcomes of *West Virginia v. EPA*, --- U.S. ----, 142 S.Ct. 2587, 213 L.Ed.2d 896 (2022) – skills that will carry over excellently to your chambers. These qualities enabled me to successfully run for and be elected as Submissions Editor for Volume 9 of the *Oil & Gas, Natural Resources, and Energy* Journal for the 2023-2024 years. I believe these skills and experiences have prepared me to excel as a judicial clerk in your chambers.

I have included my resume, writing sample, unofficial transcript, and letters of recommendation. I welcome the opportunity to interview with you, and I appreciate your time and consideration.

Respectfully,

Gabrielle A. Acosta

Gabrielle Acosta

gabrielle.hamilton@ou.edu | (325) 330-3812 | 620 Lake Vista Lane, Lavon, TX 75166

EDUCATION:

University of Oklahoma College of Law — **Norman, Oklahoma**
Juris Doctor Candidate — May 2024
Rank: **58/201** (Top 28%)
GPA: **3.5**
Law Review: **Oil and Gas, Natural Resources, & Energy Journal (ONEJ),**
Member, *Volume 8* – 2022-2023
Submissions Editor, *Volume 9* – 2023-2034
Activities: **Organization for the Advancement of Women in Law, Member**
Business Law Society, Member
Health Law Society, Member
Activities: **American Jurisprudence Award for Constitutional Law, Fall 2021**
Dean's Honor Roll, Fall 2021, Spring 2022, Spring 2023

Texas A&M University — **College Station, Texas**
Bachelor of Arts in Political Science — May 2021
GPA: **3.8, Magna Cum Laude**

PUBLICATIONS:

Major Questions Arising from the Major Questions Doctrine: A Look into the Ramifications of West Virginia v. EPA on Climate Change Regulations, 9 Oil and Gas, Natural Resources, & Energy Journal (forthcoming summer 2024).

EXPERIENCE:

Padfield & Stout, LLP — **Fort Worth, Texas**
Legal Intern — May 2023 – Present

- Drafted various motions on diverse matters under both Texas state law and Federal law, including Default Judgement, Summary Judgement, Reconsideration, and other state-specific motions. Balanced research and substantive document drafting for a matter involving Landlord Lien on sub-contractor's bitcoin mining machines. Researched and drafted memorandum on *res judicata* as applied to UCC-1 blanket liens in Bankruptcy court after state court judgment.

New & Hall, PLLC — **Dallas, Texas**
Legal Intern — August 2022-May 2022

- Drafted research memorandum on a variety of complex substantive and procedural matters, including domestication of a Texas default judgement in New York and differences between Kansas and Missouri Corporate laws. Contributed to writing numerous legal documents such as demand letters, petitions, and requests for discovery.

The Office of The Attorney General — **Norman, Oklahoma**
Criminal Appeals, Legal Intern — Summer 2022

- Researched and drafted eight Appellate briefs filed with the Oklahoma Court of Criminal Appeals.

Law Office of David Hilburn, P.C. — **Bryan, Texas**
Administrative Assistant — 2019-2021

SERVICE:

Victims Advocacy Program — **Norman, Oklahoma**
Volunteer — August 2021-Present

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THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW
UNOFFICIAL TRANSCRIPT

Acosta, Gabrielle Alyse
1735 Westbrooke Ter
Norman, OK 73072-6022

Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Torts	LAW	5144	4	B+
Constitutional Law	LAW	5134	4	A+
Research/Writing & Analysis I	LAW	5123	3	B
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 135	HA: 15	HE: 15	GPA: 9.643
Spring 2022				
Property	LAW	5234	4	A-
Criminal Law	LAW	5223	3	B
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Contracts	LAW	5114	4	B+
Oral Advocacy	LAW	5301	1	A-
GPH: 16	GPS: 149	HA: 16	HE: 16	GPA: 9.312
Fall 2022				
International Law Foundations	LAW	6060	3	A-
Equality Rights/Amer Con Law	LAW	6100	3	B-
Unincorporated Entitities	LAW	5733	3	A-
ONE J	LAW	6331	1	S
Health Care Org/Fin/Delivery	LAW	6100	3	B+
GPH: 12	GPS: 108	HA: 13	HE: 13	GPA: 9.000
Spring 2023				
Evidence	LAW	5314	4	B+
Business Associations	LAW	5434	4	A-
Mental Health Law	LAW	6100	3	B+
ONE J	LAW	6331	1	S
Real Estate Transactions	LAW	6570	3	A-
GPH: 14	GPS: 133	HA: 15	HE: 15	GPA: 9.500
Fall 2023				
Professional Responsibility	LAW	5323	3	
Wills and Trusts	LAW	5470	3	
Corporate Drafting	LAW	5712	2	
Health Data Confid./Security	LAW	6100	3	
ONE J	LAW	6331	1	

Grade Points	
A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

Interview/Counsel/Negotiation	LAW	6360	3	
Bar Exam Preparation I	LAW	6422	2	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	**GPS**	**HA**	**HE**	**GPA**
OU CUM:	56	525	59	59	9.375

UNOFFICIAL END OF RECORD ***UNOFFICIAL***

The University of Oklahoma

COLLEGE OF LAW

June 11, 2023

Re: Letter of Recommendation: Ms. Gabrielle Acosta

Dear Judge:

It is with excitement that I recommend Ms. Gabrielle Acosta for a judicial clerkship. As background, I serve as the William J. Alley Professor of Law and Director of Graduate Healthcare Law Programs and teach a range of introductory and upper-level health law courses at the University of Oklahoma College of Law (OU Law). Ms. Acosta was a student in my Health Care Organization and Finance (Fall 2022) course and in my Mental Health Law (Spring 2023) course at OU Law. As discussed in more detail below, Ms. Acosta has been a wonderful law student and would make a wonderful judicial clerk.

I first met Ms. Acosta in August 2022, when she enrolled in my Health Care Organization and Finance course at OU Law. In this course, we examined a variety of legal issues relating to health care organization, finance, and delivery. Within the first third of this course, which focused on health care organization, special attention was given to: (1) state corporate practice of medicine prohibitions; (2) the law of professional health care entities; (3) the federal Stark law; (4) the federal anti-kickback statute; (5) tax-exempt organizations; and (6) health care antitrust law. Within the second third of the course, which focused on health care financing, special attention was given to: (1) Medicare; (2) Medicaid; (3) commercial and private insurance; (4) the federal civil False Claims Act; and (5) future health insurance reforms. Within the final third of this course, which focused on health care delivery, special attention was given to the regulatory obligations of hospitals, nursing homes, home health agencies, and durable medical equipment suppliers. Ms. Acosta performed extremely well in this course. Each time I called on Ms. Acosta to present an assigned reading, she was very well prepared and was able to answer both my basic and advanced questions relating to the material. Ms. Acosta also participated when she was not on call, demonstrating that she consistently read and analyzed the material. Although grading is anonymous in this course, I was not surprised to learn that Ms. Acosta performed very well, earning a "B+" in this curved course.

During the Spring 2023 semester, I also had the pleasure of having Ms. Acosta in my Mental Health Law course at OU Law. This course examined a variety of civil and regulatory issues pertaining to mental health care access, quality, liability, and finance; mental health patients' rights; and mental health care provider and mental health insurer obligations under federal and state law. Particular attention was given to: (1) older judicial opinions that contain insensitive and stigmatizing language, including opinions that demonstrate fear and misunderstanding of individuals with mental health conditions; (2) federal and state laws protecting the confidentiality of general mental health records, substance use disorder treatment records, and psychotherapy

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notes; (3) public and private insurance coverage of mental health care, including Oklahoma mental health parity law; (4) federal and state regulation of interventions used in behavioral health care contexts such as restraint, seclusion, and electroconvulsive therapy; (5) psychiatric advance directives; (6) specialty courts designed for individuals with mental health conditions, including gambling treatment diversion courts and drug courts; (7) the treatment of mental health conditions under disability non-discrimination law as well as public and private disability benefit law; (8) the treatment of mental health conditions under state rules of professional conduct); (9) mental health malpractice; and (10) state regulation of voluntary and involuntary inpatient and outpatient treatment and/or commitment. As with Health Care Organization and Finance, Ms. Acosta was extremely well prepared. Each time Ms. Acosta was on call, she answered all of my basic and advanced questions relating to the material. She also participated when she was not on call, demonstrating that she consistently read and analyzed the material. Although grading was anonymous in this course, I was not surprised to learn that Ms. Acosta had performed very well, earning a "B+" in this curved course.

Ms. Acosta has received many honors within the OU Law community. For example, in Fall 2023, Ms. Acosta earned the American Jurisprudence Award for Constitutional Law. Ms. Acosta also has been named to the Dean's Honor Roll for three separate semesters, including Fall 2021, Spring 2022, and Spring 2023. Ms. Acosta is an active member of our student body, with membership in the Organization for the Advancement of Women in Law, the Business Law Society, and the Health Law Society. I know Ms. Acosta also is devoted to her submissions and editorial work for the *Oil and Gas, Natural Resources & Energy Journal (ONEJ)*, a top specialty law review at OU Law. Ms. Acosta has had several legal work experiences that would serve her well in the role of a judicial clerk. These experiences include service as a legal intern at Padfield & Stout, LLP in Fort Worth, Texas; service as a legal intern at New & Hall PLLC in Dallas, Texas; and service as a legal intern at the Office of the Attorney General in Norman, Oklahoma.

In summary, it is with great pleasure that I recommend Ms. Gabrielle Acosta for a judicial clerkship. If you have any questions regarding Ms. Acosta's qualifications for a judicial clerkship, please do not hesitate to email me (Stacey.Tovino@ou.edu) or call me (832/289-6313) at your earliest convenience.

Sincerely,

Stacey A. Tovino, JD, PhD
William J. Alley Professor of Law
Director, Graduate Healthcare Law Programs
The University of Oklahoma College of Law

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Guha Krishnamurthi
Associate Professor, University of Oklahoma College of Law
guha.krishnamurthi@ou.edu
(918) 360-2939

June 10, 2023

The Honorable Juan Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Recommendation for Gabrielle Acosta

Dear Judge Sanchez,

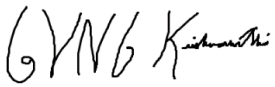
I write to recommend enthusiastically Gabrielle Acosta for a clerkship in your chambers. Gabrielle has strong analytical and writing skills and she is genuine, amiable, hard-working, and engaging. It was wonderful having her as a student in my class and I have no doubt she would serve as an excellent clerk.

As background, Gabrielle was in my 1L Constitutional Law class at University of Oklahoma College of Law. I also oversaw Gabrielle's law review note *Major Questions Arising from the Major Questions Doctrine: A Look into the Ramifications of West Virginia v. EPA on Climate Change Regulations*. In her class participation and written work, Gabrielle distinguished herself. She was such a strong participant in class, asking probing questions about facets of constitutional law. I was often impressed by her insights and creativity of argument; her classmates and I benefitted from her presence. In her final, Gabrielle performed extraordinarily well in a competitive class, receiving an A+. I structure my class to mirror practice as much as possible. My exams ask students to write short memoranda on the legal questions before them. Looking at Gabrielle's exam, I have no doubt that she will be able to produce strong, clear, well-researched legal work as a clerk. In addition, Gabrielle's law review note addressed a challenging and timely topic of the major questions doctrine and its application to environmental law. I thought her paper was creative and comprehensive. I believe that Gabrielle has a strong ability to address legal problems deeply, from a diversity of perspectives.

We have spoken about her career aspirations. She is interested in business law, environmental law, and health law, but most importantly, she is genuinely motivated by the opportunity to serve and to give back to her communities. Gabrielle is a person who will pay it forward.

In my estimation, Gabrielle would be a wonderful addition. If I can answer any further questions about Gabrielle, please do not hesitate to be in touch. I can be reached at ggkrishnamurthi@gmail.com, or at (918) 360-2939. I am very enthusiastic about Gabrielle's candidacy.

Respectfully,



Guha Krishnamurthi
Associate Professor
University of Oklahoma College of Law

Major Questions Arising from the Major Questions Doctrine: A Look into the Ramifications of *West Virginia v. EPA* on Climate Change Regulations

I. Introduction

In the case of *West Virginia v. EPA*, the United States Supreme Court was asked to consider the legality of the Clean Power Plan – a set of regulations designed to limit carbon emissions from power plants in the United States.[1] The Clean Power Plan was enacted by the Environmental Protection Agency (EPA) under the authority of Section 111 of the Clean Air Act, which gives EPA broad powers to regulate air pollution. The Supreme Court ultimately issued a stay on the Clean Power Plan in 2016, and it was later repealed altogether. However, the case remains significant as a key example of the legal battle over climate change policy in the United States. The Supreme Court, in a 6-3 decision, applied the Major Questions Doctrine and held that EPA had acted outside of its authority when promulgating the Clean Power Plan.[2]

After *West Virginia*, EPA's authority under Section 111 will exclude generation-shifting based approaches to climate regulation. Additionally, other sections of the Clean Air Act may be subject to the Major Questions Doctrine, which will disproportionately impact climate change regulation. With the arrival of this doctrine, if a case is deemed "extraordinary," which all climate change regulation is likely to be deemed, then the agency must point to "clear congressional authorization." Without more parameters from the Supreme Court about what classifies a case as "extraordinary," or the exact requirements of Congressional authorization, EPA's authority to promulgate regulations addressing important and novel climate issues under any section of the Clean Air Act will be called into question.

[1] *West Virginia v. EPA*, --- U.S. ----, 142 S.Ct. 2587, 213 L.Ed.2d 896 (2022).
[2] *Id.* at 2599 (majority opinion).

II. Decision of the Case

a. Majority Opinion

A 6-3 majority of the Supreme Court found EPA did not have the authority under Section 111(d) to promulgate the Clean Power Plan.[3] The Court reached its conclusion by establishing precedent of "extraordinary cases" that required a heightened level of judicial review and the application of the Major Questions Doctrine.[4] The Court held that under the Doctrine, Congress was required to provide a clear grant of authority of EPA's broad power, and no such grant existed. Chief Justice Roberts began the majority opinion by first addressing EPA's contention that petitioners lacked Article III Standing.[5] Next, the Court established a long history of the Major Questions Doctrine applying to "extraordinary cases."[6] Lastly, the Court applied the Major Questions Doctrine, finding that EPA's promulgation of the Clean Power Plan constitutes an extraordinary case, and, finally, that EPA lacked clear congressional delegation of authority.[7]

1. Article III Standing Requirements Satisfied

For standing, the question is whether the party has experienced an injury traceable to the judgement below, and if a favorable ruling would redress the injury.[8] The Majority addressed this question by considering whether the state petitioners were injured by the D.C. Court of Appeal's judgement, and whether an "actual controversy persis[ted] throughout all stages of litigation."[9] The Majority concluded that Government's assertion that petitioners lacked Article III standing was meritless.

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id*. at 2608
[7] *Id*. at 2610, 2614.
[8] *Id*. at 2606 (quoting *Food Marketing Institute v. Argus Leader Media*, 588 U.S. ----, ----, 139 S.Ct. 2356, 2362, 204 L.Ed.2d. 742 (2019).
[9] *Hollingsworth v. Perry*, 570 U.S. 693.

The Court found that the state petitioners were injured by the Court of Appeal's judgement because it vacated the "ACE rule and its embedded repeal of the Clean Power Plan"[10] and purported to bring the Clean Power Plan back into legal effect. The Court noted that there is little question that the Clean Power Plan injures the States, "since they are 'the object of' its requirement that they more stringently regulate power plant emissions within their borders."[11] The Majority also addressed the Government's mootness argument, which was centered on EPA's decision not to enforce the Clean Power Plan to promulgate a new Section 111(d) rule[12]. Voluntary cessation of an action does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[13] Here, the Court could not find the case moot because it was convinced that EPA will likely attempt to reimpose emissions limits based on generation shifting.

2. Precedent of Major Questions Doctrine

After its standing analysis, the Majority addressed the Major Questions Doctrine.[14] The Court explained that when the statute at issue confers authority to an administrative agency, the inquiry of meaning must be "shaped . . . by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted."[15] The Court continued, stating that "extraordinary cases" – where the "history and breadth of the authority that [the agency] has asserted," and the "economic and political significance" of the asserted authority – give reason for the Court to hesitate before concluding that Congress meant to confer such authority.[16]

Such extraordinary cases, the Majority claimed, have arisen all over administrative jurisprudence. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court found that "Congress could not have intended to

[10] *West Virginia v. EPA*, 142 S.Ct. 2587, 2606.
[11] *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562).
[12] *Id.*
[13] *Id*. (quoting *Parents Involved v. Seattle School District*, 551 U.S. 701, 719).
[14] *Id*. at 2607
[15] *Id*. (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120).
[16] *Id*. (quoting *Brown & Williamson*, 529 U.S. 120, 159).

delegate" such sweeping and consequential authority to ban tobacco products "in so cryptic a fashion."[17] Similarly, in *Alabama Association of Realtors v. Department of Health and Human Services*, the Court concluded that the CDC could not, under its authority to adopt measures "necessary to prevent . . . the spread of disease," institute a nationwide eviction ban in response to the COVID-19 pandemic.[18] In *Utility Air*, the Court found that EPA's interpretation of its authority to regulate greenhouse gasses would have given them an "unheralded" regulatory power over "a significant portion of the American economy."[19] Lastly, in *Gonzales v. Oregon*, the Court addressed the Oregon Attorney General's assertion that he could rescind the license of any physician who participated in assisted suicide, holding that the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable."[20]

The Majority further explained that in all of these extraordinary cases, both separation of powers principles and an understanding of legislative intent makes the Court "reluctant to read into ambiguous statutory text"[21] the broad delegation of power a party claims is there.[22] In order to convince the Court, the agency must point to "clear congressional authorization" for the authority it claims.[23] Chief Justice Roberts explained that the Major Questions Doctrine developed as agencies continuously asserted highly consequential power beyond what Congress could reasonably be understood to have granted.[24] The Court applied the Major Questions Doctrine because EPA used a novel generation-shifting approach in the Clean Power Plan under Section 111(d).

3. Major Questions Doctrine Applied

[17] *Brown & Williamson*, 529 U.S. 120.
[18] *Ala. Ass'n. of Realtors v. Dept. of Health and Human Services* 594 U.S. ----, ---.
[19] *Utility Air v. EPA*, 537 U.S. 302.
[20] *Gonzales v. Oregon*, 546 U.S. 243, 267.
[21] *West Virginia v. EPA*, 142 S.Ct. 2587, 2609.
[22] *Utility Air v. EPA*, 537 U.S. 302.
[23] *Id.*
[24] *West Virginia v. EPA*, 142 S.Ct. 2587, 2609.

The Majority opinion states that under precedent, this is a major questions case.[25] In its assertion that Section 111(d) of the Clean Air Act authorizes a substantial reconstruction of the energy market, EPA found a "newfound" power in the "vague language of an ancillary provision" which was designed only as a gap filler and has rarely been use.[26] Because of this, the Court found every reason to "hesitate" before concluding that Congress meant to confer on EPA the power it claims under Section 111(d).

1. Extraordinary Cases Subject to Major Questions Doctrine

Prior to 2015, EPA had always set emissions limits under Section 111 by applying processes that would reduce pollution by causing the source to operate more cleanly.[27] The Agency had never promulgated a rule—under 111—to use a system of generation-shifting pollution activity from "dirtier to cleaner sources."[28] The Court found this lack of established practice to be persuasive in determining that this is an "extraordinary case" and therefore subject to Major Questions Doctrine.

The Government claimed that the Mercury Rule, which relies on a cap-and-trade system to reduce emissions that is similar to generation shifting, is evidence of an established practice and thus the Clean Power Plan is not "extraordinary".[29] The Court noted that the Mercury Rule had always been controversial, and the legality of it had never been addressed by a court. But even assuming the Mercury Rule is valid, the Court pointed out that the rule established emission caps based on the level of mercury reduction achievable through the use of *technology* that could be installed and operated on a nationwide basis.[30] Contrasting the Mercury Rule to the Clean Power Plan, the Court explained that because the Clean Power Plan's cap on emissions was set based on a novel generation-shifting approach that created unattainable

[25] *Id*. at 2610
[26] *Id*.
[27] *See e.g.,* 41 Fed. Reg. 48706.
[28] 80 Fed. Reg. 64726.
[29] *See* 70 Fed. Reg. 28616.
[30] 70 Fed. Reg. 28620-28621.

limits—instead of a technology approach as used in the Mercury Rule (i.e.. Wet scrubbers)—Mercury Rule cannot be determined to be precedent for the Clean Power Plan.

The Majority further explained that past Section 111 regulations were made based on a technology approach, meaning an approach that focuses on improving emissions performance of individual sources.[31] In the Clean Power Plan, however, only the first "building block" is a normal technology-based regulatory approach. In the second two building blocks, EPA adopted a plan to "improve the overall power system by lowering the carbon intensity of power generation" through shifting generation to cleaner sources.[32] The Court noted that this decision is of such economic and political significance that Congress would not have delegated the power in such a cryptic fashion.[33] The Court held that this view of EPA's authority was "not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' to an entirely different kind."[34]

In addition to EPA's claimed power being entirely new, the Majority also found it unlikely that Congress would have assigned such important decisions—deciding how Americans will get their energy—to EPA when the Agency has "no comparative expertise."[35] Although the Dissent claimed that regulating the optimal mix of energy sources nationwide is EPA's "bread and butter," the Majority was unconvinced and compared it with *Alabama Association of Realtors v. Department of Health and Human Services*, where although forbidding evictions may have slowed the spread of disease, the CDC's order of such a measure was not "within its wheelhouse".[36]

Finally, the Majority claimed that at its core, the Clean Power Plan essentially adopts a cap-and-trade scheme for carbon. Further, Congress has consistently rejected proposals to amend the Clean Air Act

[31] *Id.*
[32] 80 Fed. Reg. 64784.
[33] *Brown & Williamson*, 529 U.S. 120, 160.
[34] *West Virginia v. EPA*, 142 S.Ct. 2587, 2612.
[35] *Id.* (quoting *Kisor v. Wilkie*, 588 U.S. ---, ---).
[36] *Id.*

to create such a program, and has also declined to enact similar measures, such as a carbon tax.[37] Accordingly, "the importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect."[38]

2. Clear Congressional Statement Authorizing the Regulatory Approach

Due to the suspect of EPA's claimed power, it was required to point to a "clear congressional authorization" to regulate in that matter, in accordance with the Major Questions Doctrine.[39] To do so, the Government offered EPA's authority to establish emission caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated" as evidence of Congressional delegation of authority.[40] The Government claimed that generation shifting can be described as a "system," but the Majority was unconvinced, finding that the word "system" is an empty vessel with no explicit authorization found within.[41]

Additionally, the Government suggested that other provisions of the Clean Air Act provide for the authority to establish cap-and-trade systems of emissions reduction, so Section 111 should have that authority as well.[42] The Majority explained that the difference between these three provisions—Section 110 of the NAAQS program, the Acid Rain Program set out in Title IV of the Act, and Section 111—is that those programs "contemplate trading systems as a means of complying with an already established emissions limit, set either directly by Congress (as with the Acid Rain Program[43]) or by reference to the safe concentration of the pollutant in the ambient air (as with NAAQS)."[44] Section 111, in contrast, has

[37] *Id*. at 2614.
[38] *Id*. (quoting *Gonzales*, 546 U.S. at 267-268.)
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 2615
[43] *See* 42 U.S.C. § 7651(c).
[44] *Id*.

EPA itself come up with the cap as the Agency sees fit.[45] The Court further explained that when the Acid Rain program established the first cap and trade system, Congress amended the NAAQS statute to include cap-and-trade as a means to meet the NAAQS, yet it did not say anything about a trading regime under Section 111.[46]

Lastly, the Majority explained that while the Clean Power Plan may be a sound solution to climate crisis, it is not plausible that Congress gave EPA authority to adopt the regulatory scheme in Section 111(d) on its own. Indeed, the Majority pointed out that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[47] The Court reversed the judgement of the Court of Appeals for the District of Columbia Circuit, concluding that the generation-shifting approach of the Clean Power Plan exceeded EPA's statutory authority.[48]

III. Analysis

Although Section 111 of the Clean Air Act has only been used a few times, "Congress 'knew both the scope and importance of what it was doing' when it created this authority and crafted Section 111(d) to play a vital and deliberate role in ensuring no gaps among regulated sources."[49] By limiting the application of Section 111(d), the Majority obstructed EPA's ability to thoroughly regulate all potential environmental harms. Existing fossil fuel-fired power plants are responsible for one quarter of this Nation's greenhouse gas emissions,[50] and without the ability to regulate these power plants to the extent vested by Congress to EPA, the increasing issue of climate change will continue to escalate.

A. Ordinary Statutory Interpretation Should Have Been Applied Rather than the Major Questions Doctrine.

[45] *Id*.
[46] *See* 42 U.S.C. §7410(a)(2)(A)).
[47] *West Virginia v. EPA*, 142 S.Ct. 2587, 2616.
[48] *Id*.
[49] See Brief for Respondents as Amicus Curiae, p. 3, *West Virginia v. EPA*, 142 S.Ct. 2587.
[50] EPA, *Sources of Greenhouse Gas Emissions*, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Feb. 18, 2023).

As the Dissent notes, the cases cited by the Majority to give precedent to the Major Questions Doctrine solely apply normal statutory interpretation. In these cases, the Supreme Court insisted that broad delegations of authority by Congress should be criticized to ensure Congress' intent. When a statute broadly authorizes agency action, such as Section 111 of Clean Air Act, it is important to determine two things: first, that the agency action is part of its expertise, and second, that the action does not violate any principles of Congress's broader design. This is the longstanding principle of ordinary statute interpretation. In fact, a Ninth Circuit opinion issued December 2022 reinforces the hesitation to apply the Major Questions Doctrine even after *West Virginia*.[51] There, the Circuit Court presumed that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[52] Further, the Circuit Court declined to apply the Major Questions Doctrine, and instead relied on the Chevron Doctrine and ordinary principals of statute interpretation to reach its decision.[53]

The Majority here based its precedent of the Major Questions Doctrine from *FDA v. Brown & Williamson*, where the Court stated, "In extraordinary cases there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[54] The Court in *Brown & Williamson* decided that it would not defer to FDA to regulate cigarettes and smokeless tobacco because it interpreted the relevant statute (FDCA) as negating the Agency's claimed authority—the authority to regulate because nicotine is considered a "drug." In reaching this conclusion, the Court read "the FDCA as a whole, as well

[51] *Diaz-Rodriguez v.* Garland, 55 F.4th 697.
[52] *Id*. (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996).)
[53] *Id*. ("the Court has sometimes reversed an agency's interpretation of a statute without citing *Chevron. See, e.g., Am. Hosp. Ass'n v. Becerra*, —— U.S. ——, 142 S. Ct. 1896, 213 L.Ed.2d 251 (2022); *West Virginia v. EPA*, —— U.S. ——, 142 S. Ct. 2587, 213 L.Ed.2d 896 (2022). But we remain bound by past decisions of the Supreme Court until it overrules those decisions, *see Agostini v. Felton*, 521 U.S. 203, 217, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), so we must apply *Chevron* where relevant.")
[54] *Brown. & Williamson*, 529 US 120, 159.

as in conjunction with Congress' subsequent tobacco-specific legislation," and found that it was "plain that Congress has not given the FDA the authority that it seeks to exercise here."[55]

Notably, several other cases cited by the Majority as relying on the Major Questions Doctrine used this same basic analysis to hold that an agency regulation is beyond the scope of its delegated powers. As the Dissent puts it, in cases where the Court has determined an agency was acting outside of its authority, the "eyebrow raise" is the only common factor. The Majority agrees, stating that the bottom line is whether Congress authorized such agency action.[56] Furthermore, the question in this case should have been whether Congress, when writing the broad language of Section 111(d), meant to confer the authority to create generation-shifting regulations. Due to EPA's expertise in climate crisis, and the plain language of the statute, the obvious answer is yes.

B. Congress Intended to Broadly Authorize EPA to Regulate Climate Because EPA has the Necessary Expertise to Do So.

Congress' drafting of Section 111 with broad language indicates its intention to provide EPA with ample flexibility in promulgating regulations for new and existing power plants. Additionally, Congress vested EPA with the authority to create regulations based on what it deems necessary to combat climate change. Evidently, Congress deliberately delegated this authority to allow EPA to respond to "the most pressing environmental challenge of our time."[57] Considering the history of Section 111 that undeniably endowed discretion to EPA, and based on EPA's unparalleled expertise in climate change, Congress did intend for EPA to have the power to promulgate a generation-shifting approach under Section 111(d).

Section 111(d) of the Clean Air Act has an extensive history of amendments where Congress has continuously refused to restrict regulation of existing sources, allowing EPA to have much needed flexibility to respond to evolving environmental needs. The most notable being the Clean Air Act

[55] *Id*. at 161
[56] *West Virginia v. EPA*, 142 S.Ct. 2587, 2609.
[57] *Mass. v. EPA*, 549 U.S. 497, 505.

Amendments of 1977, where the definition of "standard of performance" was modified to refer to the "best *technological* system of continuous emission reduction" for new sources under Section 111(a).[58] Although Congress amended the standard of performance for new sources, the standard for existing sources under Section 111(d) was still "best system of continuous emission reduction," which lacked the requirement of setting the standard based on the best technological approach. In 1990, Congress again amended Section 111, changing the standard of performance definition back to "best system of emission reduction" for both new and existing sources—which is now commonly referred to as the BSER.[59] The retreat back to simple "BSER" for new and existing sources in 1990 indicates Congress's intent to vest EPA the discretion to regulate new and existing sources not only through technological approaches, but to promulgate regulations based on the best *system* EPA deems necessary overall. Without a qualifier limiting the "best system of emission reduction . . . adequately demonstrated,"[60] EPA plainly has the authority to base their required standard of performance on a generation-shifting approach—shifting electricity generation from higher emitting sources to lower emitting ones.

Here, EPA's promulgation of the Clean Power Plan under Section 111(d), although unprecedented and novel, was exactly the kind of regulation intended to be allowed under the broad language of the Clean Air Act. The Supreme Court has long determined EPA to be an expert in climate crisis and environmental regulation. In *American Elec. Power*, the Supreme Court recognized that in Section 111, Congress had "delegated to EPA . . . the decision whether and how to regulate carbon-dioxide emissions from powerplants."[61] This was because Congress determined EPA to have the scientific, economic, and technological resources to address important environmental questions. What the Majority here fails to recognize is that EPA must be the agency to determine *how* emissions are regulated because they have the

[58] CAA Amendments of 1977, Pub. L. No. 95-95, §109(c)(1)(A) (amending 42 U.S.C. §7411(a)(1)). (Emphasis added).
[59] Robert R. Nordhaus and Avi Zevin, *Historical Perspectives on §111(d) of the Clean Air Act*, 44 ELR 1 1095 (2014), https://www.vnf.com/getpdf.aspx?show=3419
[60] 42 U.S.C. § 7411(d)(1).
[61] *Am. Electric Power*, 564 U.S. 410, 426

expertise that no other agency or congressman has. EPA's wheelhouse is environmental regulation, and its sole purpose is to "protect human health and the environment."[62] Along with creating regulations and procedures that decrease climate change and protect the environment, EPA also educates the public and extensively researches environmental issues that may impact human health. With hundreds of qualified scientists working within EPA, no other Agency could be tasked with reducing the nearly 60% of CO2 emissions from coal-burning power plants.[63]

C. The Major Questions Doctrine Will Disproportionately Impact Climate Change Regulation, and May Even Expand to all Federal Action.

"The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms."[64] The Court took the most efficient and cost-effective CO2 emission reduction system off the table, even though generation shifting has been used for decades. In fact, prior to this opinion, the Clean Power Plan's goal of reducing coal-based generation to 27% of national electricity generation had been exceeded, mainly through generation-shifting techniques.[65] By announcing generation shifting to be too "extraordinary," the Court effectively cut off EPA's best technique to counteract growing carbon emissions, and unnecessarily limited EPA's ability to promulgate novel climate change regulations in the future.

The issues in the United States concerning carbon emissions are not dissipating; although carbon emissions from coal plants are at an all-time low and there has been a major shift to natural gas and renewables, the United States is still falling behind. In 2022, carbon emissions and greenhouse gasses were

[62] EPA, *Our Mission and What We Do*, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Feb. 18, 2023).
[63] To see a list of cutting-edge scientists currently researching for EPA air quality matters, see *Researchers at Work*, https://www.epa.gov/sciencematters/researchers-work#air (last visited Feb. 18, 2023). See also *Coal* Explained, https://www.eia.gov/energyexplained/coal/coal-and-the-environment.php (last visited Feb. 18, 2023).
[64] *West Virginia v. EPA*, 142 S.Ct. 2587, 2628.
[65] See *Today In Energy*, https://www.eia.gov/todayinenergy/detail.php?id=48296 (last visited Feb. 18, 2023).

predicted to have increased by 1.3%—the second year in a row that emissions have increased. For the United States to meet its target set under the Paris Agreement of reducing greenhouse gas emissions 50-52% below 2005 levels by 2030, the U.S. must greatly improve its efforts.[66] Federal agencies, such as the EPA, could help close this gap.

The effect of the Supreme Court's decision in *West Virginia v. EPA* is still widely unknown. Although the decision limits EPA's options for regulating existing coal plants through generation shifting and effectively nullifies Section 111(d) of the Clean Air Act, the Agency can still pursue emission reductions through the NAAQS and HAPS programs, and it may implement other regulations that may result in indirect shifting of energy generation to lower-emitting sources. *De facto* generation shifting could be achieved through promulgating regulations that make running coal- and fossil fuel-fired plants more expensive, thus decreasing the prevalence of energy generated at these plants, and by ensuring coal- and fossil fuel-fired generation is less competitive compared to renewable energy sources such as wind and solar.[67] Regardless, the main issue posed by this decision is how the arrival of the Major Questions Doctrine will impact environmental regulations going forward.

The arrival of the Major Questions Doctrine poses serious ramifications to federal agency action. Ultimately, parties will be using the Major Questions Doctrine to challenge federal agency action for years to come. The significance and political stigmatization of climate change issues and regulations makes it likely that, under the Major Questions Doctrine, most new climate change regulations will be deemed "extraordinary," and likely outside of Congress's intention to delegate. Additionally, other Federal action outside of climate change issues will be impacted. In fact, the Eleventh Circuit has already applied the Major Questions Doctrine to a new area: an Executive Order requiring federal contractors to ensure their employees are fully vaccinated against COVID-19.[68] The circuit court concluded that the Procurement Act

[66] *Id.*
[67] Shay Dvoretzky, Emily J. Kennedy, Elizabeth A. Malone, *West Virginia v. EPA: Implications for Climate Change and Beyond*, Skadden Insights Blog (Sept. 21, 2022) https://www.skadden.com/insights/publications/2022/09/quarterly-insights/west-virginia-v-epa.
[68] *Georgia v. President of U.S.*, 46 F.4th 1283.

did not vest the President the authority to mandate vaccines. The concurrence by Judge Anderson identifies the issue here—that the Major Questions Doctrine, as announced by the *West Virginia* Court, should only apply to federal *agency* action, not Executive Orders.[69] This is unfortunately only the beginning of the magnified scope of the Major Questions Doctrine, and without proper guidance from the Supreme Court, courts all over the nation will be left to apply the Major Questions Doctrine how they see fit.

The extent of how "extraordinary" a case must be for the Major Questions Doctrine to apply is unclear, and outside of amending all legislation to ensure Congressional authorization is clear, agencies may be in a gridlock. As the Dissent notes, how far does the Majority constrain EPA with the Major Questions Doctrine?[70] Are all EPA regulations that are deemed "extraordinary"—in which most debatable environmental regulations seem likely to be—going to be considered outside the scope of EPA's congressionally vested authority? Indeed, the Majority's main reason for finding the Clean Power Plan "extraordinary" was its novelty.[71]

IV. Conclusion

The Supreme Court's decision to limit EPA's authority to regulate carbon emissions from existing power plants under Section 111(d) of the Clean Air Act is a setback for the fight against climate change. The Majority's application of the Major Questions Doctrine, rather than ordinary statutory interpretation, ignored Congress' clear intent to delegate broad authority to EPA and to allow for flexible and innovative approaches to combat climate change. Furthermore, EPA's expertise in this area, coupled with the plain language of the statute, strongly supports the agency's authority to regulate emissions from existing power plants using a generation-shifting approach. As the world faces a mounting climate crisis, it is imperative that EPA is allowed to regulate all sources of carbon and greenhouse gas emissions, including existing power plants, to effectively reduce the harmful effects of climate change on our planet.

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[69] *Id*. at 1313
[70] *West Virginia v. EPA*, 142 S.Ct. 2587, 2632
[71] *Id*. at 2612

Human activities currently release over 30 billion tons of carbon dioxide into the atmosphere every year,[72] and atmospheric carbon dioxide concentrations have increased by more than forty percent since pre-industrial times.[73] This increase of carbon dioxide is in direct correlation to climate change, which can lead to extreme temperatures, polluted air and water, extreme weather events, wildfires, and diseases and allergens.[74] Although EPA has other resources for regulating climate change and coal-fired energy production besides generation shifting under Section 111(d), the impact of *West Virginia* may be more far reaching than realized. Even with new promulgations from EPA expected to emerge in the next few months, the *West Virginia* decision may prove to further limit the regulatory power of EPA under the Major Questions Doctrine.

This Court reached its decision by first establishing Article III Standing, then establishing that the Major Questions Doctrine has been applied throughout the history of "overbroad" agency regulations, and finally concluding that EPA's promulgation of the Clean Power Plan was outside of Congress's intention due to it's supposed ambiguity in Section 111(d) of the Clean Air Act. Through the arrival of the Major Questions Doctrine, the Majority essentially created a new way to strike down federal conduct dealing with unprecedented issues when acting under broad congressional authorization, triggering unanswered major questions.

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[72] Hayhoe, K., D.J. Wuebbles, D.R. Easterling, D.W. Fahey, S. Doherty, J. Kossin, W. Sweet, R. Vose & M. Wehner. (2018). *Our changing climate*. In: *Impacts, risks, and adaptation in the United States: Fourth national climate assessment, volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock & B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, p. 76. doi: 10.7930/NCA4.2018

[73] IPCC. (2013). *Climate change 2013: The physical science basis*. *Working Group I contribution to the fifth assessment report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex & P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom, and New York, NY, p. 166.

[74] EPA, *Environments and Contaminants – Climate Change*, https://www.epa.gov/americaschildrenenvironment/environments-and-contaminants-climate-change#:~:text=Both%20human%20activities%20and%20natural,%2C%20pesticides%2C%20and%20other%20chemicals (last visited Feb. 18, 2023).

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The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
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Dear Chief Judge Sanchez,

I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term. I am a rising third-year student at Harvard Law School, but many of my closest friends live in Philadelphia and I hope to move there after graduation. I am especially interested in working for you after learning of your support for clerks who are dedicated to public service.

Please find my resume, law school transcript, undergraduate transcript, and writing sample attached. You will also receive letters of recommendation from the following people:

- Prof. Adriaan Lanni, Harvard Law School, adlanni@law.harvard.edu, (617) 384-9814
- Prof. Rebecca Goldstein, Berkeley Law School, rgoldstein@berkeley.edu, (617) 584-0116
- Chair Charlotte Burrows, Equal Employment Opportunity Commission, Charlotte.Burrows@eeoc.gov, (202) 921-3061

At Harvard, I honed my legal research and writing skills as a Selections Editor for the *Journal of Law and Gender*, a research assistant to Prof. Adriaan Lanni and Prof. Rebecca Goldstein (for their books on restorative justice and progressive prosecutors, respectively), and as a Teaching Assistant for Criminal Law. I have complex litigation experience through my work at the U.S. Department of Justice, Civil Rights Division, NAACP Legal Defense Fund, and the Equal Employment Opportunity Commission. I worked closely with clients as an intern at Mobilization for Justice and Greater Boston Legal Services, as well as the parole director of the Harvard Prison Legal Assistance Project, which will help me understand the perspectives of the litigants who come before you in court. Lastly, I can bring my pre-law school experience as a Research and Program Associate at the Brennan Center for Justice, studying federal and state courts. There, I worked closely with federal judges and helped draft amicus briefs submitted to the U.S. Supreme Court and U.S. Court of Appeals for the First Circuit.

I deeply admire your dedication to serving our country, and I hope to serve as a clerk in your chambers. Thank you for your time and consideration.

All the best,
Janna Adelstein

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Women's Law Association, Public Interest Committee
Lambda, Pan-Harvard Conference Chair
Research: TA for Prof. Erin Kelly, Criminal Law
RA for Prof. Adriaan Lanni
RA for Prof. Rebecca Goldstein
Fellowships: Cravath International Fellow (2023)
Harvard Club of New York Child Advocacy Fellowship (2022)

VANDERBILT UNIVERSITY, B.A. *cum laude* in Political Science, Art History, and U.S. History, May 2019
Activities: History and Political Science Departments, Research and Teaching Assistant
Study Abroad: University College London, Spring 2018

EXPERIENCE

NAACP LEGAL DEFENSE FUND, *Legal and Policy Intern*, New York, NY Summer 2023
Will support LDF's litigation and policy efforts, focusing on criminal justice, economic justice, education, and political participation.

U.S. DOJ CIVIL RIGHTS DIVISION, EMPLOYMENT LITIGATION SECTION, *Legal Intern*, Washington, DC Summer 2023
Draft complaints and legal research for cases brought by the U.S. against employers who violate Title VII of the Civil Rights Act.

HARVARD EMPLOYMENT LAW CLINIC, *Student Attorney*, Cambridge, MA Fall 2022
Placement at Greater Boston Legal Services. Help low income overcome obstacles that limit their employment opportunities by representing them in legal proceedings and conducting legal research on a range of topics, including employment discrimination.

HARVARD PRISON LEGAL ASSISTANCE PROJECT, *Parole Director & Student Attorney*, Cambridge, MA Fall 2021-present
Manage all parole cases taken on by student attorneys. Represent incarcerated clients in parole and disciplinary hearings.

EQUAL EMPLOYMENT OPPORTUNITY COMM., *Legal Intern, Chair Charlotte Burrows*, Washington, DC. Summer 2022
Performed legal research on civil rights issues including disability rights, gender equity, LGBTQ+ rights and racial justice.

MOBILIZATION FOR JUSTICE, *Legal Intern, Warren J. Sinsheimer Children's Rights Program*, New York, NY Summer 2022
Provided legal representation to low-income parents of students with disabilities seeking special education services in New York.

BRENNAN CENTER FOR JUSTICE, *Research and Program Associate, Democracy Program,* New York, NY 2019 – 2021
Performed research and advocacy to promote fair, impartial, and diverse courts. Lead research on demographic and professional diversity on state supreme courts. Work cited by *The New York Times, The Washington Post*, and in a brief filed on behalf of 16 states before the U.S. Court of Appeals for the First Circuit. Co-authored reports on access to justice during Covid-19 and outside spending in judicial elections. Worked closelywith federal and state appellate judges and law school deans, among others.

VERA INSTITUTE OF JUSTICE, *Development Associate & Intern,* New York, NY Summer– Winter 2018
Wrote reports on major donors for the executive team and assisted on grant applications worth up to $10 million.

HOUSE OF COMMONS, PARLIAMENT OF THE UNITED KINGDOM, *Policy Intern*, London, U.K. Spring 2018
Worked in Office of Hon. David Lammy, MP. Helped craft legislation and policy on treatment and outcomes for people of color in the U. K's justice system. Wrote briefs on Mr. Lammy's behalf that were delivered to the Secretary of State and the Home Secretary.

PUBLICATIONS

Janna Adelstein & Brooke Ackerly, *Violence, Silence, and the Six Faces of Oppression in Breaking the Silence around Sexual Assault*. CONTEMPORARY POLITICAL REVIEW (2023) (Pending Review).

Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CENTER FOR JUSTICE (2020).

Janna Adelstein, *Art as Power: Medici as Magi in the Fifteenth Century*, VANDERBILT HISTORICAL REVIEW (2017).

Harvard Law School

Date of Issue: June 6, 2023
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Page 1 / 2

Record of: Janna Elizabeth Adelstein
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 2 Greiner, D. James	P	4
1001	Contracts 2 Kennedy, Randall	P	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	P	2
1003	Legislation and Regulation 2 Freeman, Jody	P	4
1004	Property 2 Mann, Bruce	P	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Franklin, Morgan	CR	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

2519	American Legal History: From Reconstruction to the Present Weinrib, Laura	P	3
1024	Constitutional Law 2 Jackson, Vicki	P	4
1002	Criminal Law 2 Lanni, Adriaan	H	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	P	2
1005	Torts 2 Davis, Seth	P	4

Spring 2022 Total Credits: 17
Total 2021-2022 Credits: 38

Fall 2022 Term: September 01 - December 31

8012	Employment Law Clinic Churchill, Steve	H	3
2070	Employment Law Workshop: Advocacy Skills Churchill, Steve	H	2
2079	Evidence Brewer, Scott	H	4
3160	Policing and Incarceration: Paths to Reform Goldstein, Rebecca * Dean's Scholar Prize	H*	2
2864	Transgender Law & Politics MacKinnon, Catharine	P	2

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing MacKinnon, Catharine	EXT	0

Winter 2023 Total Credits: 0

Spring 2023 Term: February 01 - May 31

3192	Advanced Readings in The Thirteenth Amendment Goodwin, Michele	CR	1
2050	Criminal Procedure: Investigations Jain, Eisha	P	4
2084	Family Law Halley, Janet	P	3
3119	Poverty Law Workshop: A Toolkit for Addressing Inequity & Homelessness Gwin, Elizabeth	H	2
2654	Restorative and Transformative Justice Lanni, Adriaan	H	2

Spring 2023 Total Credits: 12
Total 2022-2023 Credits: 25

Fall 2023 Term: August 30 - December 15

2472	Comparative Law: Ancient Law Lanni, Adriaan	~	3
2473	Roman Law Donahue, Charles	~	3
2249	Trial Advocacy Workshop Sullivan, Ronald	~	3

Fall 2023 Total Credits: 9

Fall 2023 - Winter 2024 Term: August 30 - January 19

8002	Criminal Justice Institute: Criminal Defense Clinic Umunna, Dehlia	~	5
2261	Criminal Justice Institute: Defense Theory and Practice Umunna, Dehlia	~	4

Fall 2023 - Winter 2024 Total Credits: 9

continued on next page

Assistant Dean and Registrar

HARVARD LAW SCHOOL OFFICE OF THE REGISTRAR VE RI TAS LEX ET JUSTITIA

Harvard Law School

Record of: Janna Elizabeth Adelstein

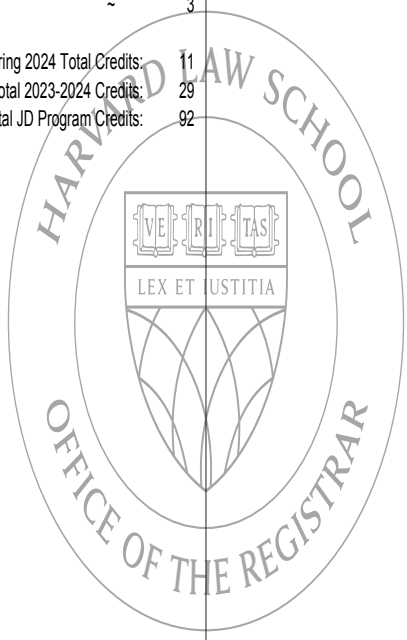
Date of Issue: June 6, 2023
Not valid unless signed and sealed

Spring 2024 Term: January 22 - May 10

2000	Administrative Law Block, Sharon	~	4
2048	Corporations Hanson, Jon	~	4
2169	Legal Profession Gordon-Reed, Annette	~	3

Spring 2024 Total Credits:	11
Total 2023-2024 Credits:	29
Total JD Program Credits:	92

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
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Cambridge, Massachusetts 02138
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www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to recommend Janna Adelstein for a clerkship in your chambers. I have had the honor and pleasure of getting to know Janna in a variety of contexts: as a student in my 1L reading group, my 1L Criminal Law class, and my Restorative and Transformative Justice seminar, as well as a Research Assistant providing support for both my teaching and my research. Let me get right to the point: Janna is bright, incredibly hard-working, mature, and personable. I couldn't recommend her more enthusiastically.

I first came to know Janna through my 15-person reading group for first year law students, Alternatives to Incarceration. Reading groups are ungraded discussion groups designed to bring together law students and professors with similar interests for academic discussion. The course requirements in the first year of law school are very heavy, and in my experience as the semester wears on and exams approach some students in the reading group prioritize their graded classes. Janna did not. She came to every class well-prepared, having clearly read and thought about the assignment. It was clear from class discussion that she is bright, insightful, thoughtful, and creative. Janna also stood out for her open-mindedness and ability to engage productively and respectfully with points of view with which she did not agree.

The following spring Janna was in my 1L Criminal Law course. She excelled in the class and was equally comfortable with doctrinal analysis and policy discussions. Her comments in class were always on point. Her exam demonstrated good legal judgment and the ability to think and write clearly and well under time pressure. She was also a star in my Restorative and Transformative Justice seminar. Her response papers for that course were always insightful, clearly argued, and well-written. The course also involved some simulations, for example a victim-offender dialogue, and a policy-writing project. Janna stood out as a leader and outstanding collaborator, making sure both that her team accomplished its objectives, and that all members of the team had the opportunity to participate and be heard.

Impressed by her performance in my class, I hired her as my Research Assistant. Since then, she has done phenomenal work. I have had her help me update my coursepack readings for my criminal adjudication course by researching recent cases, law review articles, and journalism on the topics covered by the class. She showed excellent judgment in choosing pieces that might be worth adding to the syllabus. She also assisted me in the process of revising an article on restorative justice. The volume editors, who are based in Europe, had made all sorts of cryptic references in their comments to academic literature and restorative justice programs in European countries that I was not familiar with. I gave the paper and editors' comments to Janna and, without any supervision and in record time, she was able to write me a memo summarizing the literature and programs referred to and how she thought they related to my paper. I am looking forward to having her continue as my research assistant in the fall as I begin work on a book on restorative justice. Janna is efficient, hard-working, able to take and follow direction carefully, and to take initiative and use good judgment when necessary. All these skills will serve her well as a clerk and in her legal career.

I know Janna quite a bit better than students in my large courses. She did not have the socio-economic advantages of many of her classmates, but has managed by talent and an impressive work ethic to excel at Harvard Law School. She is dedicated to a career in civil rights, either in government or at an NGO, and has taken advantage of all that Harvard has to offer to prepare for this path. I expect great things from her. She is active in a number of organizations at the law school and is well-liked by her peers; I'm sure she would get on with everyone in chambers. She has my most enthusiastic recommendation.

Sincerely yours,

Adriaan Lanni
Professor of Law
Harvard Law School

Adriaan Lanni - adlanni@law.harvard.edu - 617-384-9814

June 9, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to strongly recommend Janna Adelstein for a clerkship in your chambers. Through my work with Janna, I have found her to have an extremely strong intellect, exceedingly good writing skills, sound judgment, and a winning personality.

I know Janna predominately through her work in my seminar, Policing and Incarceration: Paths to Reform, in Fall 2022, where she earned the Dean's Scholar prize for being the top student in the class. I was visiting HLS from Berkeley Law and teaching this course for the first time. It was clear to me that Janna always read all the cases and other materials closely, her short essays on our class discussion site were always perceptive, and she consistently brought thoughtful and insightful reactions to our class discussions. Janna also wrote a truly excellent final paper about the Prison Rape Elimination Act. In the paper, she astutely analyzed the history, successes, and failures of the PREA, and proposed concrete, realistic policy solutions to enhance the PREA's ability to protect incarcerated people from sexual assault.

In addition to her excellent course work, Janna also wrote a great memo for me as a student research assistant. Her work summarizing progressive prosecutors' efforts to implement restorative justice programs and lobby for reforms to state-level qualified immunity proved extremely helpful for a book project I am working on. In short, Janna is a self-starter with a real talent for analyzing issues at the intersection of law and policy, and I have been consistently impressed with her work.

More broadly, Janna's academic performance at HLS has been strong. She received honors grades (top third of the class) in two competitive doctrinal classes, Criminal Law and Evidence. She is developing a deep expertise in employment law through work both inside and outside the classroom, but she has a more general passion and curiosity that will serve her well in a clerkship and beyond. I am confident that, as a law clerk, she would smoothly and quickly take to the wide variety of issues that come across her desk.

Janna is committed to progressive causes, as is evident from her past experiences and future plans. I have no doubt that she will be a leading progressive lawyer in her chosen field. But Janna is not an ideologue — to the contrary, she is open-minded, curious, and eager to learn.

Finally, Janna has a winning personality. She is warm, funny, easygoing, and a pleasure to be around. I know the importance of having a chambers community that gets along, and I'm confident that you and your other clerks will enjoy working with her.

For these reasons, I believe Janna would be a very strong law clerk. Please do not hesitate to reach out with any questions.

Sincerely,

Rebecca Goldstein, PhD
Assistant Professor of Law, University of California, Berkeley

MEMORANDUM

To: [redacted]
From: Janna Adelstein
Date: September 2, 2022
Re: Employment Discrimination Based on Caste

Introduction

This memo discusses whether the Equal Employment Opportunity Commission (EEOC) should address caste discrimination as a legally cognizable issue under Title VII of the Civil Rights Act of 1964. The EEOC has not yet held a hearing, issued guidance, or put forth any public comment on whether or not caste discrimination violates any of the laws the agency enforces despite being urged to do so by several advocacy organizations. Paige Smith, *U.S. Civil Rights Agency Urged to Recognize Caste Bias*, BLOOMBERG (May 10, 2021 3:17 PM), https://news.bloomberglaw.com/daily-labor-report/u-s-civil-rights-agency-urged-to-recognize-caste-discrimination.

Background

The problem of whether or not caste discrimination is a legally cognizable issue under Title VII came to a head in 2020 after an employee at Cisco Inc. alleged that he had suffered adverse employment consequences because of he was a member of the Dalit caste, formerly known as the "untouchables.". *Case to Watch: Cisco Lawsuit Tests Anti-Bias Laws' Application to Indian Caste System*, REUTERS LEG.: WESTLAW TODAY (July 30, 2020), https://today.westlaw.com/Document/Ia28d9d10d25e11ea85dce8228c52478f/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Subsequently, Apple announced that it was updating its general employee conduct policy to explicitly prohibit discrimination on the basis of caste. Paresh Dave, *Caste in California: Tech*

giants Confront Ancient Indian Hierarchy, REUTERS (August 15, 2022, 3:26 PM), https://www.reuters.com/business/sustainable-business/caste-california-tech-giants-confront-ancient-indian-hierarchy-2022-08-15/. Other tech companies including Amazon, Dell, Facebook owner Meta, Microsoft and Google all announced that they had a zero-tolerance policy for caste discrimination. *Id.*

Summary of Legal Arguments

After the issue of whether or not caste discrimination would constitute discrimination for the purposes of Title VII gained public traction, several scholars began to analyze the potential legal arguments plaintiffs could use to insist that caste be considered a protected class.

The most prominent legal analysis of the issue was published last year in the *Harvard Law Review* and is discussed in detail in the following section of this memo. Guha Krishnamurthi and Charanya Krishnawawami, *Title VII and Caste Discrimination*, 134, HARV. L. REV. 456, 456, (2021). The authors believe that caste discrimination is best understood as a form discrimination based on one's national origin within the enumerated protected categories of Title VII. *Id* at 471. However, they ultimately conclude that the most secure way for caste discrimination to be prohibited is for the EEOC to "issue an opinion letter or guidance clarifying that Title VII's provisions prohibiting race, national origin, and/or religious discrimination forbid discrimination on the basis of caste" or for "Congress to pass legislation that explicitly states that caste discrimination is unlawful under Title VII." *Id* at 481.

Legal Argument that Caste Discrimination Might Violate Title VII

Overview

Several legal scholars have put forth an argument that caste might be considered a protected class under Title VII of the Civil Rights Act of 1964, thus prohibiting employment

discrimination based on caste. For example, in 2021, Professor Guha Krishnamurthi and Charanya Krishnawawami examined how caste discrimination could be considered a type of racial discrimination, religious discrimination, and national origin discrimination for the purposes of Title VII. Guha Krishnamurthi and Charanya Krishnawawani, *Title VII and Caste Discrimination*, 134, HARV. L. REV. 456, 456, (2021). During a briefing on fighting caste discrimination hosted by the International Coalition for Dalit Rights (ICDR), Professor Kevin Brown expressed his agreement with the below legal arguments, indicating wider scholarly consensus. *ICDR's Special Congressional Briefing: Fighting Caste Discrimination in the USA*, ICDR (2022) (statement of Prof. Kevin Brown, University of South Carolina School of Law).

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Thus, in order for caste discrimination to be covered by Title VII, it must fall within one of these categories. Krishnamurthi and Krishnaswami argue that caste could possibly fall within the race, religion, or national origin categories following the Supreme Court's but-for causation test as laid out in their *Bostock v. Clayton County* decision. *Title VII*, 134, HARV. L. REV. 456, 470. As Justice Gorsuch laid out in *Bostock,* [But-for] causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock v. Clayton County*, 140 S. CT. 1731, 1739 (2020).

Krishnamurthi and Krishnaswami also consider whether caste is "conceptually" dependent on one of the categories covered by Title VII, and thus could still be covered by the statute. *Title VII*, 134, HARV. L. REV. 456, 471. The conceptual dependence test says that "[i]f a putative non-protected basis for discrimination conceptually depends on the protected

characteristics of the plaintiff, then the basis for discrimination is 'because of' the relevant protected category." Guha Krishnamurthi and Peter Salib, *Bostock and Conceptual Causation*, YALE J. REG.: NOTICE & COMMENT (July 22, 2020).

National Origin as a Basis for Caste Discrimination to be Covered by Title VII

However, Krishnamurthi and Krishnaswami argue that caste discrimination could be considered discrimination based on national origin. *Title VII*, 134, HARV. L. REV. 456, 471. They cite the EEOC to show that discrimination based on South Asian heritage constitutes discrimination on the basis of national origin. *Id,* U.S. Equal Emp. Opportunity Comm'n, *National Origin Discrimination*, https://www.eeoc.gov/national-origin-discrimination. Krishnamurthi and Krishnaswami go on to explain, "but for the employee [facing caste discrimination] having an ancestor who had a particular caste identity defined and dictated by South Asian culture and practice, the employee would not have been discriminated against." *Title VII*, 134, HARV. L. REV. 456, 472. As for the conceptual test, the authors argue that you cannot conceptualize a person's identity as belonging to a certain case without placing that in the context of South Asian culture. *Id* at 473.

Brain Elzweig of the University of South Florida has also analyzed this issue, coming to the a conclusion that caste discrimination cannot be thought of as national origin discrimination because "The caste system… would likely be seen as a system of social stratification within an ethnic group" *Caste Discrimination and Federal Employment Law in the United States*, 44 U. ARK. LITTLE ROCK L. REV. 57, 86 (2021). Elzweig believes that caste discrimination is best considered as a form of discrimination based on ancestry within the national origin category because caste is an innate characteristic of ancestry because it is based on one's descent, only based on a social hierarchy imposed on one at birth. *Id* at 9.

Race as a Basis for Caste Discrimination to be Covered by Title VII

Krishnamurthi and Krishnaswami also discuss whether or not caste discrimination would constitute discrimination based on race. "Race" is not defined by Title VII. 42 U.S.C. § 2000e-2(a) They begin by discussing the Supreme Court's 1987 decision in *Saint Francis College v. Al-Khazraji*, which indicates that discrimination based on ancestry might be considered racial discrimination because discriminating based on ancestry targets a person "because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens.'" 481 U.S. 604 at 607 (1987). If the Supreme Court adheres to this logic, then there is a plausible argument to be made that caste discrimination could constitute racial discrimination; however, such a case has yet to be presented to the current Court. *Title VII*, 134, HARV. L. REV. 456, 475-76.

Color as a Basis for Caste Discrimination to be Covered by Title VII

Lastly, Krishnamurthi and Krishnaswami argue that caste discrimination is likely unable to be considered discrimination based on color. According to the EEOC, "[c]olor discrimination occurs when a person is discriminated against based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone." U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2006-1, *Questions and Answers about Race and Color Discrimination in Employment* (2006) https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment. However, there is little support for the claim that caste discrimination is related to one's skin tone, pigmentation, or shade, etc. *Title VII*, 134, HARV. L. REV. 456, 476-77.

Other scholars have also taken up this issue. For instance, Ben Whitley of the University of Arkansas at Fayetteville released an article making similar arguments to Krishnamurthi and

Krishnaswami about why caste should be considered a protected class under Title VII. *Importing Intolerance: How Title VII Can Prevent Caste Discrimination in the American Workplace*, 75 ARK. L. REV. 163 (2022). Whitley centers his legal arguments in the "theory of intersectionality," which he believes indicates that caste discrimination is protected under Title VII because such discrimination only occurs because of a person's existence in several different protected classes.

Whitley argues for broader inclusion of caste within the enumerated categories of Title VII as compared to Krishnamurthi and Krishnaswami. *Importing Intolerance* 75 ARK. L. REV. 163, 178. For example, he asserts that caste discrimination should be considered a form of discrimination based on color because "lower caste applicants report that their skin color is an immediate way to reveal their lower caste status, which in turn, severely limits their ability to be hired… [T]he connection (between caste and color) has subsequently been cemented into Hindu culture—a culture that has now immigrated into the American workplace." *Id* at 188.

Sex as a Basis for Caste Discrimination to be Covered by Title VII

Krishnamurthi, Krishnaswami, and the other legal scholars discussed quickly dismiss sex as a basis for caste discrimination under the but-for causation and conceptual causation tests because people can be discriminated on based on their caste regardless of their sex. *Title VII*, 134, HARV. L. REV. 456, 471-72.

Conclusion

The strongest argument that Krishnamurthi and Krishnaswami present is to argue that discrimination in employment based on one's caste is a form of national origin discrimination under the but-for or conceptual tests. *Title VII*, 134, HARV. L. REV. 456, 471. The authors believe that the best recourse to prevent this kind of discrimination would be to amend the text of Title

VII itself, and to have the EEOC "issue an opinion letter or guidance clarifying that Title VII's provisions prohibiting race, national origin, and/or religious discrimination forbid discrimination on the basis of caste." *Id* at 481. Other scholars such as Brain Elzweig and Prof. Kevin Brown also support this argument, as discussed above. *Caste Discrimination*, 44 U. ARK. LITTLE ROCK L. REV. 58, 86 (2021); *ICDR's Special Congressional Briefing*, ICDR (2022) (statement of Prof. Kevin Brown, University of South Carolina School of Law).

Existing Case Law

Cisco Case

There is limited case law on caste discrimination aside from a California case against Cisco Systems, Inc. *Cal. Dep't Fair Emp. & Hous. v. CISCO Sys., Inc.,* No. 5:20-cv-04374-NC (N.D. Cal. 2020) (dismissed). An anonymous Dalit employee at Cisco known as John Doe alleging that he had been paid less, denied employment opportunities, and marginalized by his coworkers because of his caste. Paige Smith, *Caste Bias Lawsuit Against Cisco Tests Rare Workplace Claim*, BLOOMBERG L. (July 17, 2020, 2:45 AM), https://news.bloomberglaw.com/daily-labor-report/caste-bias-lawsuitagainst-cisco-tests-rare-workplace-claim. The California Department of Fair Employment and Housing subsequently brought a suit alleging that his managers and thus Cisco had engaged in illegal employment discrimination in violation of Title VII. *Id.*

After Doe's case was publicized, thirty female Dalit engineers at Google, Apple, Microsoft, and other tech companies released an anonymous statement in the *Washington Post* discussing their experiences with caste bias in the workplace and asking the tech industry to do more to prevent and remedy these acts of discrimination in the future. Nitasha Tiku*, India's Engineers Have Thrived in Silicon Valley. So Has Its Caste System., WASH. POST* (Oct. 27, 2020,

6:45 PM), https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley. This piece with the *Post* was thought to have helped Doe's case by raising the issue of whether or not caste discrimination is cognizable under Title VII. *Title VII*, 134, HARV. L. REV. 456, 458.

On August 5, 2022, the California Court of Appeals for the Sixth District ruled in Doe's favor, deciding that he could proceed with the lawsuit under a pseudonym in open court. Robert Brunson, *Ex-Cisco Worker Claiming Caste Discrimination Avoids Arbitration*, Bloomberg, (Aug. 5, 2022, 9:25 PM), https://www.bloomberg.com/news/articles/2022-08-06/ex-cisco-worker-claiming-caste-discrimination-avoids-arbitration. Doe sought to maintain anonymous to ensure his family members in India could remain safe. *Id.* The appeals court also affirmed the trial court's ruling rejecting Cisco's motion to move the lawsuit to arbitration. *Id.*

Other Notable Cases

Other than the Cisco case, there is virtually no other litigation raising the novel issue of whether caste is a protected class under Title VII. However, there are limited cases involving intra-racial discrimination that might inform how a federal court will rule on this issue.

For example, the Southern District of New York decided *Ali v. National Bank of Pakistan* in 1981, which dealt with a case of intra-racial discrimination based on skin tone. 508 F. Supp. 611 (S.D.N.Y. 1981). Like the cases involving caste discrimination, Ali also involves litigants of South Asian descent. *Id.* Ali was a light-skinned person from the Punjab province of Pakistan, who alleged that the National Bank discriminated against him by giving preference to darker-skinned Pakistani employees from the Sind province in employment opportunities. *Id* at 611-12. The Court rejected Ali's argument that the National Bank had violated Title VII, saying the presumption of a protected class status on the basis of color is bound up with an entire national

racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience." *Id* at 613.

However, the court indicated that a color discrimination case could be successful if the plaintiff "establish a pattern of discrimination by ancestral national origin, or by color or provincial residence as actual indicators thereof even assuming such evidence would constitute a cause of action." *Id* at 614. Perhaps a caste discrimination case could succeed under this logic were they able to provide concrete evidence that their caste was a direct contributor to an adverse employment action. Ali is the most recent intra-racial discrimination case involving South Asian litigants. Sonika R. Data, *Coloring in the Gaps of Title VI: Clarifying the Protections Against the Skin-Color Caste System*, 107 GEO. L. J. 1393, 1399 (2019).

On the other hand, there is some plaintiff friendly case law allowing for an employment claim based on perceived nationality which could help litigants seeking to include caste as a protected class under Title VII. In *Arsham v. Mayor & City Council of Baltimore*, the United States District Court for the District of Maryland ruled in favor of the plaintiff who alleged that she was discriminated against because her supervisor discriminated against her because he believed her to be a member of the Parsee ethnic group of Iran even though she was of Indian descent. 85 F. Supp. 3d 841, 844 (D. Md. 2015). People of Parsee descent have lived in Indian for several centuries, and because of this, they are sometimes thought of as a caste by people there. Rashna Writer, Parsi Identity, 27 IRAN 129 (1989). However, the court did not mention whether Mistry thought of Parsees as a caste in India or an ethnic group, and thus it is not directly applicable to the issue of caste discrimination. It is possible that a future court could interpret the *Arsham* case to consider Parsees as a caste in India, which would help the argument that caste is a protected class under Title VII.

Conclusion

[redacted] As discussed, this topic is gaining significant traction within big technology companies in California, and the presence of the ongoing Cisco litigation provides a natural entry point for the EEOC to weigh in on this issue. Specifically, the EEOC could more closely examine the salience of the legal arguments that caste discrimination is a form of discrimination based on national origin or ancestry.

The EEOC's mission is to "to stop and remedy unlawful employment discrimination in the workplace by enforcing Federal laws that prohibit employment discrimination." *U.S. Equal Employment Opportunity Commission (EEOC) Open Government Plan*, EEOC, July 2016, https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan. Thus, it is consistent with the agency's mission to uncover whether or not acts of workplace discrimination violate existing federal laws in order to promote an inclusive and equitable workplace.

Applicant Details

First Name	**Oluwaseun**
Last Name	**Adeyemi**
Citizenship Status	**U. S. Citizen**
Email Address	**oadeyemi@nd.edu**
Address	**Address** Street **2909 Russ Lane** City **Lithonia** State/Territory **Georgia** Zip **30058** Country **United States**
Contact Phone Number	**6787399643**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2019**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Emerging Technologies**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Miller, Paul
paul.miller@nd.edu
574-631-6729
Garnett, Nicole S.
ngarnett@nd.edu
This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year law student at Notre Dame Law School, and I am writing to apply for a clerkship in your chambers beginning in 2024.

My background has prepared me to be a successful judicial clerk with you. As a returned Peace Corps volunteer, I have experience working with all types of people. I am an effective communicator, and I acclimate easily to new environments. Two of the most valuable skills I honed during my time in the Peace Corps are listening and taking initiative. The independent nature of Peace Corps required initiative to address issues and create plans to make things better. In addressing the issues of the community, I found that listening was the most important part of finding solutions.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. You will receive letters of recommendation from the following people:

Professor Nicole Garnett
Notre Dame Law School
ngarnett@nd.edu
(574) 631-8078

Professor Paul Miller
Notre Dame Law School
paul.miller@nd.edu
(574) 631 1516

Sincerely,

Oluwaseun Adeyemi

Oluwaseun (Esther) Adeyemi

(678) 739-9643 • oadeyemi@nd.edu
2909 Russ Lane, Lithonia, GA 30058

EDUCATION

University of Notre Dame Law School — Notre Dame, Indiana
Juris Doctor Candidate — May 2024
GPA: 3.41
Activities: Notre Dame Journal on Emerging Technologies, Executive Notes Editor; Black Law Student Association; Welsh Family Hall, Assistant Rector; Women's Legal Forum

University of Pennsylvania — Philadelphia, Pennsylvania
Bachelor of Arts in Psychology — May 2019
GPA: 3.32
Honors: Thompson Fellowship; Onyx Honor Society
Activities: Delta Sigma Theta Sorority, Inc; Black Pre-Law Association; African Student Association;

EXPERIENCE

Cozen O'Connor — Philadelphia, PA
Summer Associate — May 2022 – July 2022; May 2023 – Present
- Researched a variety of legal issues to assist attorneys in various litigation matters
- Drafted legal memorandum to assist attorneys in their written briefs

Whirlpool Global – Transactional Division — Benton Harbor, MI
Legal Extern — January 2023 – Present
- Reviewing contract terms and analyzing its effects on the company
- Researching new law on issues that affect the business
- Drafting legal memorandum to synthesize research

City of Philadelphia Commerce Department — Philadelphia, PA
Workforce Training Coordinator — September 2020 – June 2021
- Coordinated with 39 community organizations to facilitate training for 200+ cleaning ambassadors
- Created reports to monitor progress of cleaning ambassadors and presented for quarterly evaluations
- Participated in a panel to review grant proposals

Peace Corps of America — Amazonas, Peru
Youth in Development Volunteer — September 2019 – March 2020
- Taught summer classes of English, Theater, and World Cultures to 70+ students between the ages of six to sixteen
- Developed curriculum to raise awareness of American culture in Peruvian youth to encourage global citizenship
- Co-facilitated nutrition classes to 20+ mothers teaching them how to improve eating habits to combat anemia
- Generated monitoring and evaluating reports used by the United States government to evaluate the efficacy of Peace Corps in Peru and monitor relations between the United States and Peru

University of Pennsylvania, Netter Center for Community Partnerships — Philadelphia, PA
Mentor — September 2015 – May 2019
- Tutored 30+ students weekly in Spanish, English, Science, and Math leading to an overall increase in academic performance
- Developed individualized SAT and ACT prep lesson plans to address each students' weaknesses and strengthen test performance resulting in an increase in test scores by all students tutored
- Collaborated with the school administration to organize monthly leadership seminars to promote college readiness

University of Pennsylvania Biddle Law Library — Philadelphia, PA
Data Analyst — May 2018 – August 2018
- Analyzed the evolution of legal contracts over a span of 20+ years
- Collaborated with team members to analyze data, identify trends and generate reports for lead researchers

LANGUAGE SKILLS

Language – Spanish Intermediate Level, Consortium for Advanced Studies Abroad (Barcelona, Spain)

INTERESTS

Afrobeat music and dance, international travel, musical theater

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UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Adeyemi, Oluwaseun
Student ID: XXXXX9306

Date Issued: 05-JUN-2023
Page: 1

Birth Date: 02-02-XXXX

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Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2021													
Law School													
LAW	60105	Contracts	4.000	A-	14.668								
LAW	60302	Criminal Law	4.000	B+	13.332								
LAW	60703	Legal Research	1.000	B	3.000								
LAW	60705	Legal Writing I	2.000	B+	6.666								
LAW	60901	Torts	4.000	B+	13.332								
			Total		50.998	15.000	15.000	15.000	3.400	15.000	15.000	15.000	3.400
Spring Semester 2022													
Law School													
LAW	60307	Constitutional Law	4.000	B+	13.332								
LAW	60308	Civil Procedure	4.000	B-	10.668								
LAW	60707	Legal Resrch & Writing II-MC	1.000	A-	3.667								
LAW	60906	Property	4.000	B+	13.332								
LAW	70812	Jurisprudence	3.000	A-	11.001								
			Total		52.000	16.000	16.000	16.000	3.250	31.000	31.000	31.000	3.323
Fall Semester 2022													
Law School													
LAW	70101	Business Associations	4.000	B	12.000								
LAW	70313	Law of Education	3.000	A-	11.001								
LAW	70807	Professional Responsibility	3.000	B+	9.999								
LAW	73717	Transnational Civil Litigation	3.000	B+	9.999								

CONTINUED ON PAGE 2

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